IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

FRANK XAVIER FRANCISCO, Petitioner,

v.

J. S. GATHRIGHT, Superintendent, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

DANIEL C. KAUFMAN
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

November, 1973

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ

A. In affirming the district courts refusal to reach the merits of a claim upon which petitioner had exhausted his state remedies, the United States Court of Appeals has decided an important federal question in a way in conflict with the applicable decisions of this Court. 7

B. In refusing to consider the mertits of petitioner's independent claim for relief upon which no question of exhaustion of remedies existed, the Court of Appeals has rendered a decision in conflict with the decisions of the Court of Appeals for the Second and Eighth Circuits and has decided an important question of federal law which has not been but should be settled by this Court. 9

Conclusion 11

Appendix A -- Opinions Below

Opinion and Judgment of the Court of Appeals 1a
Opinion and Judgment of the District Court 4a

Appendix B -- Text of 28 U.S.C. §§2241 et seq. 1b

TABLE OF AUTHORITIES

Brown v. Allen , 344 U.S. 443 (1953) 9

Fay v. Noia, 372 U.S. 391 (1963) 9

Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) 10

Leary v. United States, 395 U.S. 6 (1969) 8

Peyton v. Rowe, 391 U.S. 54 (1968) 9,11

Roberts v. LaVallee, 389 U.S. 40 (1967) 7,8,9

Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973) 9,10

United States ex rel. Levy v. McMann, 394 F.2d 402 (2d Cir. 1968) 10

United States ex rel. Boyance v. Myers, 372 F.2d 111 (3d Cir. 1967) 10

Wheeler v. Beto, 407 F.2d 816 (5th Cir. 1969) 10

Wilwording v. Swenson, 404 U.S. 249 (1971) 9

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

FRANK XAVIER FRANCISCO, Petitioner,

v.

J. S. GATHRIGHT, Superintendent, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Frank Xavier Francisco, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 27, 1973.

Opinions Below

The memorandum opinion of the Court of Appeals, not officially reported, appears in Appendix A hereto at 1a. The order of the United States District Court for the Eastern District of Virginia, at Alexandria, appears in Appendix A hereto at 4a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 5, 1973. No petition for rehearing was filed, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a person in custody pursuant to the judgment of a State court who has presented a claim to the State courts in the course of the direct criminal proceedings, is to be denied federal habeas corpus relief merely because the State Supreme Court has rendered a subsequent decision in another case which confirms that his claim is meritorious.

2. Whether a person in custody pursuant to the judgment of a State court who claims that such custody is, in two independent respects, in violation of the Constitution of the United States, must await federal habeas corpus relief on one ground merely because the other ground should have been presented to the State courts.

Constitutional Provisions

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Amendment XIV, Section 1

". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions

Petitioner was prosecuted under Section 54-524. 101(a) of the 1950 Code of Virginia, as amended prior to 1972, which provided as follows:

> "§54-524. 101. Unlawful acts; penalties -- (a) Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:
> "(1) To distribute, or possess with intent to distribute a controlled drug.
> "(2) To manufacture a controlled drug.
> "A conviction for a violation of this §54-524. 101(a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

Petitioner sought post-conviction relief under 28 U.S.C. §§2241, et seq. These statutory provisions are somewhat lengthy and are set forth in Appendix B hereto.

Statement of the Case

This case involves important procedural questions concerning the rights of persons held in custody pursuant to a judgment of a State court to a speedy and efficient adjudication of the lawfulness of such custody under the Constitution of the United States. Since petitioner's claims have not been adjudicated on the merits by the Court of Appeals, a brief sketch of his substantive claims will suffice for purposes of this petition.

Petitioner Frank Xavier Francisco was arrested in the bedroom of his apartment, following the warrantless, forcible entry by Investigator William Luzi and other officers of the Fairfax County, Virginia, Police Department, shortly after midnight on February 28, 1971. At that time a quantity of heroin was seized from his person and from atop a dresser

in the room. Another individual present in the apartment, known to Luzi as a narcotics addict was released without charges placed against him. Petitioner was immediately taken before a Justice of the Peace for an initial appearance and held in the Fairfax County Jail in lieu of money bond. Petitioner's arrest was predicated on an informer's tip and Luzi's observations through the curtained window in the living room of petitioner's apartment. The informant, Robert DeBruin, who then had narcotics charges pending against him, had several hours earlier communicated to Luzi that petitioner had purchased heroin and was "cutting it up" for distribution. Pursuant to plan, DeBruin entered petitioner's apartment with marked money, purportedly to purchase drugs, at about half-past midnight. DeBruin had agreed to pay petitioner for the drugs with the marked money in front of the window if he observed the narcotics on the premises. He was then to lock himself in the bathroom to impede destruction of the heroin. When Luzi observed DeBruin hand the money to petitioner he knocked on the apartment door and upon an occupant's refusal to admit him, forced the door open. Unknown to the officers, DeBruin had not observed any drugs in the apartment, but had paid petitioner to settle a debt. Nothing passed from petitioner to DeBruin.

Petitioner was charged with the unlawful possession, with intent to distribute, a controlled drug, heroin, and was incarcerated prior to trial by reason of his inability to make bond. Prior to trial, petitioner moved to suppress the narcotics seized on the grounds that his arrest was not supported by probable cause and that the officer's failure to secure a warrant was not excused by exigent circumstances. One week before the scheduled trial date of May 28, 1971, a hearing was held on the motion to

suppress. The motion was taken under advisement and, on the morning of trial, denied.

At trial, the Commonwealth's witnesses were Luzi, a chemist, and DeBruin. Luzi testified as to the events immediately surrounding the arrest and seizure; the chemist identified the material seized as heroin. DeBruin testified that petitioner had agreed to sell heroin to him that evening and had sold heroin to him on one previous occasion. The defense presented evidence that both petitioner and DeBruin were addicted to heroin, and that DeBruin's reputation in the community for truth and veracity was poor. Petitioner did not testify in his own behalf. In the course of its charge to the jury, the court instructed them, over defense counsel's objection, of the statutory presumption that "a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug possessed." The jury returned a verdict of guilty on the offense charged, sentencing petitioner to eight year's imprisonment at hard labor.

Petitioner sought appellate review of his conviction by petitioning the Supreme Court of Virginia for writ of error and supersedeas. Among the grounds for appeal were (1) that he was arrested and the drugs seized in violation of the Fourth Amendment in that the warrantless, forcible entry into petitioner's dwelling to effect his arrest was not based on probable cause or required by exigent circumstances and (2) the above-quoted instruction was based on a presumption without rational basis, thereby denying petitioner due process. In a per curiam order dated December 14, 1971, the Supreme Court of Virginia declined to review petitioner's conviction.

In October 1972, petitioner commenced this habeas corpus proceeding in the United States District Court for the Eastern District of Virginia, at Alexandria. As grounds for the relief sought, petitioner presented the arrest and seizure claim and the instruction claim previously presented to the state courts. The Commonwealth was ordered by the district court to show cause why the writ should not be granted. In its answer filed November 11, 1972, the Commonwealth admitted that petitioner had exhausted his state remedies on both claims. It contended, however, that petitioner should again present to the state courts the question of the constitutionality of the challenged instruction. This contention was predicated on the decision of the Supreme Court of Virginia handed down some one month earlier, Sharp v. Commonwealth, 213 Va. 269, 192 S.E. 2d 217 (1972), invalidating the instruction on state and federal constitutional grounds. The district court entered summary judgment against petitioner, ruling against him on the merits of the Fourth Amendment claim and declining to reach the merits of the challenge to the instruction. In dismissing the latter claim without prejudice, the district court although expressly acknowledging that petitioner "has exhausted his remedies before on this issue," agreed with the Commonwealth's contention that the instruction claim "should be left to the state courts." Petitioner noted his appeal from this decision and a certificate of probable cause was granted by the district court. The United States Court of Appeals for the Fourth Circuit under Rule 7 of its local rules, considered the case without briefs or oral argument. On August 27, 1973 it issued a memorandum decision affirming that part of the district court's order which relegated the instruction claim and vacating the district court's resolution of the merits of the Fourth Amendment claim.

Reasons for Granting the Writ

A. In affirming the district courts refusal to reach the merits of a claim upon which petitioner had exhausted his state remedies, the United States Court of Appeals has decided an important federal question in a way in conflict with the applicable decisions of this Court.

The decisions of the Courts below squarely conflict with this Court's decision in Roberts v. LaVallee, 389 U.S. 40 (1967) and the consistent holdings of this Court that a person seeking federal habeas corpus relief need only have presented his case once to the state courts. The courts below have interposed needless procedural hurdles to the resolution on the merits of claims first presented to the state courts more than two years ago. A person seeking relief in federal court from an unconstitutional state court conviction may properly be required to exhaust his state remedies. He should not be required to exhaust himself by becoming a ping-pong ball batted back and forth between two judicial systems. The Commonwealth's position, adopted by the district court and the court of appeals, is that the effect of the tardy recognition by the Supreme Court of Virginia of well-established constitutional principles is to require petitioner, whose assertion of identical principles before that court was summarily to again assert those claims in the state judicial system. That position has been consistently rejected by this Court.

Roberts v. LaVallee, supra, involved virtually the identical factual situation to that presented in the instant case. The state trial court had rejected Roberts' request for a free transcript of his preliminary hearing. After conviction and exhaustion of direct appellate review, Roberts collaterally attacked his conviction in federal court on the ground that the refusal

to provide an indigent defendant with a free transcript was unconstitutional. The district court rejected Roberts' claim on the merits. While his appeal from that decision was pending, the highest court of the state held that, as a matter of constitutional law, indigent defendants are entitled to a free transcript of their preliminary hearing. The court of appeals, while acknowledging that Roberts had exhausted his state remedies, "thought the constitutional necessity for federal court intervention was 'open to doubt' and that 'the question ought to be decided in favor of permitting a state court determination in the first instance' " 389 U.S. at 41. Accordingly, as did the district court below, it dismissed the petition without prejudice to renewal following the state court proceedings. This Court vacated the court of appeals decision, noting that "[s]till more state litigation would be both unnecessarily time consuming and otherwise burdensome." 389 U.S. at 43. As in Roberts, there is no substantial state interest in ruling once again on petitioner's instruction claim; there is no reason shown why the Commonwealth wishes to burden its judicial system with an issue which is governed by established federal principles. In deciding Sharp v. Commonwealth, the Supreme Court of Virginia relied on no intervening change in federal or state law. The state court decisions cited on the point antedated petitioner's state appellate proceedings by at least eight years. This Court's decision in Leary v. United States, 395 U.S. 6 (1969) was relied upon by the Supreme Court of Virginia to invalidate the challenged instruction on due process grounds as a presumption without rational basis; the excerpt from Leary quoted in Sharp was identical to that which petitioner had quoted in his petition for writ of error. In short, the decisions below are in irreconcileable conflict with Roberts v. LaVallee, supra.

Roberts is in accord with the well-established principle that while state courts are to be given an initial opportunity to pass upon and correct violations of constitutional rights, petitioners are not required to make repetitious applications for relief to state court. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971); Brown v. Allen, 344 U.S. 443 (1953). This Court has rejected "procedural hurdles to the achievement of swift and imperative justice on habeas corpus" see Fay v. Noia, 372 U.S. 391, 435 (1963), and has recognized that "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty." see Peyton v. Rowe, 391 U.S. 54, 63 (1968). Resolution of petitioner's claim has hardly been swift. Some two and one-half years has elapsed since petitioner's conviction; his petition for writ of habeas corpus was filed more than one year ago. The Commonwealth should not be permitted to interpose the further delay incident to state habeas corpus proceedings and any appeals therefrom.

B. In refusing to consider the merits of petitioner's independent claim for relief upon which no question of exhaustion of remedies existed, the Court of Appeals has rendered a decision in conflict with the decisions of the Court of Appeals for the Second and Eighth Circuits and has decided an important question of federal law which has not been but should be settled by this Court.

The Court of Appeals in the instant case held that the merits of petitioner's Fourth Amendment claim should not be reached because his independent claim for relief predicated on an unconstitutional instruction should be considered by the State courts. In so doing, the court rendered a decision in conflict with the decisions in Tyler v. Swenson, 483 F. 2d 611

(8th Cir. 1973), and United States ex rel. Levy v. McMann, 394 F. 2d 402 (2d Cir. 1968). Moreover, the decision below interposes a significant and unnecessary delay in the final resolution of claimed deprivations of constitutional rights. This Court has not squarely determined the proper procedure to be followed where a petition for writ of habeas corpus asserts independent claims for relief. This is an important question which should be settled.

In Levy, supra, the United States Court of Appeals for the Second Circuit held that a petitioner for federal habeas corpus relief has a right to a decision on the merits of claims for relief upon which State remedies have been exhausted notwithstanding the presence in the petition of claims for relief which have not been presented to the state courts.[1/] As noted by the Court in Levy, "dismissal of the entire petition would be, at best, a waste of petitioner's and the State's time and, at worst, so frustrating that petitioner having exhausted his energies, might submit to the alleged injustices." 394 F. 2d at 404. In Tyler, supra, the Eighth Circuit aligned itself with the Second, following Levy. See 483 F. 2d at 614-15. While the Court of Appeals below had earlier indicated agreement with Levy, see Hewett v. North Carolina, 415 F. 2d 1316, 1320 (4th Cir. 1969), the decision below represents a retreat from that position. The Third Circuit has held that the pendency in state court of a collateral attack based on grounds independent of those asserted in federal courts does not relieve the federal court of its obligation to hear and determine the claim presented to it. See United States ex rel Boyance v. Myers, 372 F. 2d 111, 112 (3d Cir. 1967). It thus appears that the Third Circuit would follow Levy. It is submitted that the decision in Levy is in keeping with this Court's

1/ The Fifth Circuit has taken a contrary position. See Wheeler v. Beto, 407 F. 2d 816 (5th Cir. 1969).

removal of procedural barriers which impair a state prisoner's right to swift relief from unconstitutional conviction. Thus, Peyton v. Rowe, 391 U.S. 54 (1968), saw the demise of the rule that an attack on a later consecutive sentence was not to be deferred until the prisoner began to serve that sentence.

In the instant case, petitioner's claims for relief are completely independent. More importantly, a decision on the arrest and seizure claim favorable to petitioner will, as a practical matter, preclude the Commonwealth from retrying him. On the other hand, the constitutional defect in the trial caused by the challenged instruction can be remedied by a new trial. Petitioner has been incarcerated for some two and one-half years. Must he await the outcome of a collateral attack on his conviction in state court and, if successful, retrial and direct appeal before he can have an adjudication on the merits of his arrest and seizure claim? If petitioner establishes that his conviction rests on Constitutionally tainted evidence "each day he is incarcerated under that conviction while his case is in the courts will be time that he might properly have enjoyed as a free man." See Peyton v. Rowe, supra, 391 U.S. at 64.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Daniel C. Kaufman
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 "H" Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

APPENDIX A

Opinions Below

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1313

FRANK XAVIER FRANCISCO,

Appellant,

versus

J. S. GATHRIGHT, Supt.
Bland Correctional Farm,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Submitted: May 14, 1973 Decided: AUG 27 1973

MEMORANDUM DECISION

Frank Xavier Francisco, a Virginia prisoner, seeks a certificate of probable cause to appeal a district court order denying his petition for a writ of habeas corpus.

Francisco was convicted of possession, with intent to distribute, of a controlled drug (heroin) in violation of Va. Code Ann. § 54-524.101(a). In his petition for federal habeas corpus relief he alleged that his arrest occurred without probable cause and that the subsequent search

exceeded its permissible scope. He also contended that the statutory presumption relating to possession with intent to distribute is unconstitutional. The state admitted that Francisco had presented these claims in his petition for a writ of error to the Virginia Supreme Court which denied review and affirmed the conviction by order on December 14, 1971. Subsequently, however, in the case of Sharp v. Commonwealth, 213 Va. 269, 192 S. E. 2d 217 (1972), the Virginia Court held the statutory presumption to be unconstitutional and the state has admitted that Francisco's claim relative to the constitutional issue may now have merit under Sharp. However, the state asked that Francisco be required to submit his claim to the state courts since Sharp was decided after the State Supreme Court's denial of review in his case.

The district court agreed with the state "that it should be left to the state courts to determine whether the petitioner's case is controlled by Sharp." We affirm this holding. If the state does not comply with the mandate of the district court, Francisco can reapply to the district court for relief. We feel, however, that the district court was premature in reaching the merits of Francisco's allegations of illegal arrest and illegal search and seizure. If relief is granted under Sharp, the state will have the

option of releasing Francisco or retrying him. In either event the possibility exists that this claim for relief will be mooted.

We therefore vacate that portion of the district court opinion denying relief on the claims of illegal arrest and illegal search and seizure, and direct the district court to dismiss these claims without prejudice. Francisco will therefore be free to reassert this claim if it is not mooted by further proceedings on his claim for relief under Sharp.

Accordingly, a certificate of probable cause to appeal is granted, the judgment of the district court is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

Clement F. Haynsworth, Jr.

Chief Judge, Fourth Circuit

A True Copy, T e s t e:

William K. Slate, II, Clerk

By Diane Burke
Deputy Clerk

/s/ H. E. Widener, Jr.
United States Circuit Judge

John D. Sirica
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FRANK XAVIER FRANCISCO, Petitioner,	)	
V.	)	CIVIL ACTION NO. 430-72-A-M
J. S. GATHRIGHT, Superintendent Bland Correctional Farm, Respondent.	)	

ORDER

Frank X. Francisco attacks his state conviction for failure to suppress the evidence in that he alleges his arrest occurred without probable cause absent exigent circumstances and that the subsequent search exceeded its permissible scope. Moreover, he contends that an unconstitutional instruction relating to possession of narcotics with intent to distribute was improperly submitted to the jury.

An examination of the transcript of the suppression hearing (M. Tr.) and trial (T. Tr.) reveals that on February 27, 1971, Robert DeBruin informed Officer Luzi of the Fairfax County Police Department that the petitioner, Frank X. Francisco, possessed heroin and was in the process of cutting it up for distribution. (M. Tr. 20, 21) DeBruin admitted that he personally had previously purchased drugs from Francisco and was invited to procure more that evening. (M. Tr. 21, 25) DeBruin, moreover, was known to Luzi as being a drug addict with two

recent arrest charges still pending against him for the sale and control of narcotics. (M. Tr. 17, 18) Luzi contended that DeBruin had indirectly given reliable information in the past although he did not specify the nature of the earlier complaints. (M. Tr. 8, 20) He had also indicated to DeBruin that the latter's present assistance would be brought to the attention of the Commonwealth Attorney. [DeBruin even testified at the preliminary hearing that he acted as an informer "to clear" himself of drug charges with the understanding that something might be done for him if he helped. (T. Tr. 49, 52)]

Relying upon the information obtained from DeBruin, Luzi arranged a meeting with him for midnight outside of Francisco's apartment. At that meeting DeBruin was instructed to obtain entrance into the apartment and endeavor to purchase drugs with marked money which he was given. The police positioned themselves outside of the window of the apartment with the understanding that an observation, as seen through the thin curtains, of the passing of money from DeBruin to Francisco would be a signal to show that narcotics were visible and accessible. (M. Tr. 8, 26) The arrest was then to be based on this pre-arranged signal, that is, the "pass," although it was not contended that anyone saw Francisco hand DeBruin anything in exchange for the marked bills and no testimony indicated that DeBruin had actually seen heroin for sale in the apartment at the time of the signal. (M. Tr. 22, 25) [As a matter of fact, DeBruin testified at the trial that the initial

exchange of money observed by the police outside of the window was the payment of a prior debt for drugs and not a new purchase. (T. Tr. 38, 41)]

Soon after DeBruin entered the apartment he made the "pass" by the window which then prompted the police to enter the apartment to arrest Francisco. Another person met the police at the door and attempted to prevent them from entering. The police proceeded to push through the door and arrest the defendant in the back bedroom. They confiscated ten (10) decks of heroin on his person and thirty-eight (38) more on a bureau near him. (M. Tr. 12, 13)

Evidence obtained by a search in violation of a defendant's constitutional rights is inadmissible. Mapp v. Ohio, 367 U.S. 643 (1961). Therefore, before a warrantless arrest is deemed proper, the prosecution must establish that probable cause existed for the arrest and that exigent circumstances obviated the requirement to procure a magistrate's independent judgment. Beck v. Ohio, 379 U.S. 95, 97 (1964); McDonald v. United States, 335 U.S. 451, 456 (1948). The lawfulness of a warrantless arrest, however, cannot be based on the reliability of an unknown informer. Katz v. Peyton, 334 F. 2d 77 (4th Cir.), affirming, 232 F. Supp. 131 (E. D. Va.), cert. denied, 379 U.S. 915 (1964), rehearing denied, 379 U.S. 984 (1965). Corroboration of "the essential particulars," though, by an investigation prior to arrest may be sufficient to establish probable cause. United States v. Irby,

304 F. 2d 280 (4th Cir.), cert. denied, 371 U.S. 830 (1962).

In Aguilar v. Texas, 378 U.S. 108 (1964), the Court established a two-pronged test to measure the effect of an informant's reliability on a police officer's determination of probable cause. It must affirmatively appear to a neutral and detached magistrate that the officer was informed of some of the "underlying circumstances" from which it could be concluded that the informant was reliable and the information credible. There is a three-tiered method of analysis for testing the validity of an informant's conclusions. First, the information can be corroborated by the informant's knowledge of minute detail and particularity. Secondly, direct personal observation can assure first-hand knowledge of facts rather than mere suspicion or rumor. And finally, actual participation in the illegal activity carries its own degree of credibility since it is a declaration against penal interests.

Credibility and reliability can further be ascertained by an affiant's averment that the informant was known and has proven himself by having previously furnished other information which was instrumental in procuring convictions. Moreover, the affiant's own knowledge of the alleged suspect's reputation or subsequent observation of incriminating actions by the suspect may corroborate an informer's accusation. See Spinelli v. United States, 393 U.S. 410 (1969); Manley v. Commonwealth, 211 Va. 146, 176 S.E. 2d 309 (1970).

The standards where police act without a warrant are at least as stringent as those required for an affidavit. Aguilar, supra, at 111; Whiteley v. Warden, 401 U.S. 560 (1971); McCray v. Illinois, 386 U.S. 300, 305 (1967); Wong-Sun v. United States, 371 U.S. 471, 479 (1963). The mere existence of probable cause is not sufficient to justify non-compliance with the warrant procedure. Coolidge v. New Hampshire, 403 U.S. 443, 451 (1971); Angello v. United States, 269 U.S. 20, 33 (1925). It is fully recognized that:

> The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." (Citations omitted.) Coolidge, supra, at 455.

In reviewing the evidence presented at the suppression hearing in the case at bar, the basic issue is when probable cause was sufficiently established. The only proof apparent, prior to the window observation, to support the two-prong test of Aguilar was the informant DeBruin's admission against his penal interests that he had purchased narcotics in the past from the suspect Francisco. (M. Tr. 21) United States v. Harris, 403 U.S. 573 (1971). Additionally, there was DeBruin's statement

that Francisco had told him he had recently bought a quarter pound of heroin and would sell him some if interested. (M. Tr. 20, 25) [Another informer, Carcio, also told the police the same story but it carries no extra weight since his information came from DeBruin. (M. Tr. 9)] There was not, however, any testimony that DeBruin had personally observed narcotics on Francisco or in his apartment prior to entering his home the night of arrest.

Officer Luzi did make the bare statement that DeBruin, known only at that point as a drug addict, had "indirectly" given reliable information in the past. (M. Tr. 8) This did little to support the informant's credibility and reliability since he did not specify the nature of the underlying circumstances of the earlier complaints. (M. Tr. 17, 18, 20) There was no evidence either that the information supplied as to other cases was instrumental in securing any convictions. To establish credibility and reliability, more than a mere assertion that an informer has given reliable information before is needed to provide a factual basis for crediting his report. United States v. Harris, supra, at 579; Riggan v. Virginia, 384 U.S. 152 (1966); Wiles v. Commonwealth, 209 Va. 282, 163 S.E. 2d 595 (1968). While it is further recognized that a police officer's (or affiant) own knowledge of a suspect's reputation can corroborate the truthfulness of an informant's accusation, "a bald and unilluminating assertion of suspicion," standing alone, is entitled to no weight.

Spinelli, supra, at 414; Nathanson v. United States, 290 U.S. 41, 46 (1933). Such was the case here since Luzi did not know the suspect personally but only by way of some unexplained "police department complaints." (M. Tr. 7)

It is similarly difficult to find that the act of passing the money in front of the window in itself corroborated the veracity of DeBruin's initial assertions for there was no incriminating conduct on the part of the suspect. Moreover, an informer's tip cannot be sustained by activities which "contain no suggestion of criminal conduct when taken by themselves -- and they are not endowed with an aura of suspicion by virtue of the informer's tip." Spinelli, supra, at 418; Nathanson, supra.

While each stage of material proof, standing alone, failed to substantiate a showing of probable cause the totality of circumstances affirmed such a finding. First the declaration against penal interests by DeBruin of his involvement in criminal activity carried its "own indicia of credibility - sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a break does not eliminate the residual risk and opprobrium of having admitted criminal conduct." Harris, supra, at 583, 584. Luzi's statements, although vague, that DeBruin had given reliable information in the past and that some form of unspecified complaints had at least been received before on Francisco deserved some weight, if only slight, as being corroborative when balancing

the probabilities. Finally, the passing of the money, when viewed by the police, served a legitimate purpose in that it was an action by DeBruin to signal to Officer Luzi that he, DeBruin, had now personally observed narcotics in Francisco's possession, an element not previously confirmed. (M. Tr. 8, 26) It is immaterial whether DeBruin had actually seen the drugs present or not, for what the police believed to be the interpretation of his signal is the subject of analysis. At this moment the test for the sufficiency of probable cause to arrest was ultimately fulfilled.

Whether the observation itself constituted an illegal search is another issue. Technically it was not a trespass to search the suspect or his premises but a procedure to enable the police to view a "signal" from the informant for the purpose of corroborating prior averments. It would have been no different than had the police waited for DeBruin to return from the apartment and confirmed his earlier allegation with direct personal knowledge. It is obvious that Francisco was not relying on the security of his apartment but rather upon his misplaced confidence that DeBruin would not reveal his wrongdoing. DeBruin was not a surreptitious observer but an invited guest who was knowingly given entry and the opportunity to view the contraband. Hoffa v. United States, 385 U.S. 293 (1966). See also, United States v. White, 401 U.S. 745 (1971). Since

this observation was a method for executing a plan to view only the actions of the informant, no constitutional infirmity exists because the validity of the arrest was not bootstrapped by an unlawful search of the suspect. "The Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347 (1967).

The assumption that the police had ample time to procure a warrant must also fail. Although there was not a substantial basis for a warrant to issue initially, the sufficiency of probable cause to arrest did arise at the apartment after the signal was given by DeBruin to the police. The realities of narcotic dealing then dictated that an arrest be pursued immediately. Since narcotics are easily disposed of either by destruction or sale, even late at night, "exigent circumstances" almost invariably exist. (M. Tr. 10, 26) Therefore immediate warrantless arrests based upon probable cause are imperative. United States v. Irby, supra.

Once it was established that the police lawfully entered the apartment to arrest the defendant then a search incident to that lawful arrest was legal. Trupiano v. United States, 334 U.S. 699 (1948). "It has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Harris v. United States, 390 U.S. 234 (1968). The thirty-eight (38) decks of heroin

were easily recognizable as contraband since they were in transparent plastic bags on top of the dresser in the defendant's bedroom where he was arrested. (N. Tr. 13, T. Tr. 18)

Finally, Francisco attacks the constitutionality of the statutory presumption relating to possession with intent to distribute. The respondent admits in his answer that this allegation has merit in light of Sharp v. Commonwealth, 213 Va. 269, 192 S.E. 2d 217 (1972), and suggests that it should be left to the state courts to determine whether the petitioner's case is controlled by Sharp. This Court agrees and, provided the Commonwealth on its own initiative, affords the petitioner a hearing within forty-five (45) days on this issue, this matter is dismissed without prejudice. However, in light of the fact that Francisco has exhausted his remedies before on this issue, albeit prior to the decision in Sharp, leave is given petitioner, should such a hearing not be conducted, to apply to this Court for reinstitution of this action in order to have this Court consider the issue on its merits.

Accordingly, relief is denied on all grounds raised by the petitioner and it is ORDERED that summary judgment be granted in favor of the respondent.

The petitioner is advised that should he desire to appeal, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of this Order. In default of such notice, the Clerk is requested to return the state court records to the Clerk of the Circuit Court of Fairfax County.

The Clerk is further directed to send a copy of this Order to the petitioner, his counsel, the respondent and the Attorney General of Virginia.

/s/ C. F. B., Jr.
United States District Judge

Alexandria, Virginia
January 23rd, 1973

APPENDIX B

Text of 28 U.S.C. §§2241 et seq.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

§ 2254 cont'd

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-5768

FRANK XAVIER FRANCISCO, PETITIONER,

v.

J. S. GATHRIGHT, Superintendent, Bland Correctional Farm, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Petition for Writ of Habeas Corpus in the United States District Court	2
Respondent's Answer in United States District Court	11
Extracts from State Court Record before United States District Court	13
Complaint and Arrest Warrant issued by the Justice of the Peace, Fairfax County, February 28, 1971	13
Indictment returned May 17, 1971	14
Motion to Suppress Evidence filed May 18, 1971	15
Order taking Motion to Suppress Evidence under advisement following evidentiary hearing May 21, 1971	16
Order denying Motion to Suppress Evidence, May 28, 1971	17
Letter Opinion denying Motion to Suppress Evidence, May 28, 1971	18
Extract from Transcript of Jury Trial, Instruction No. 6, May 28, 1971	19

Page

Judgment of Conviction filed May 28, 1971 20
Notice of Appeal and Assignments of Error, June 29, 1971 23
Extract from Petition for Writ of Error filed in Virginia Supreme Court, July 19, 1971 25
Extract from Brief in Opposition to Petition for Writ of Error filed in Virginia Supreme Court, July 28, 1971 .. 33
Order Refusing Petition for Writ of Error, December 14, 1971 35
Order of the United States District Court granting Summary Judgment in favor of Respondent, January 23, 1973 36
Petitioner's Motion to Stay Proceedings with Exhibit A thereto, filed February 12, 1973 43
Order of the United States District Court Denying Motion to Stay Proceedings, February 16, 1973 49
Memorandum Opinion of the United States Court of Appeals August 27, 1973 50
Judgment of the Court of Appeals, August 27, 1973 52
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari, March 4, 1974 . 53

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 5, 1972—Petition for Writ of Habeas Corpus and request to proceed in forma pauperis received by United States District Court for the Eastern District of Virginia, Alexandria, Virginia.

October 26, 1972—Order issued (1) denying request for to proceed in forma pauperis, (2) directing respondent to answer Petition for Writ of Habeas Corpus, and (3) withholding execution to allow petitioner to submit filing fee.

October 31, 1972—Filing fee paid; Petition for Writ of Habeas Corpus docketed.

November 17, 1972—Answer to Petition for Writ of Habeas Corpus filed.

January 23, 1973—Order entered granting summary judgment in favor of respondent.

February 12, 1973—Notice of Appeal, Application for Certificate of Probable Cause, Motion to Proceed on Appeal In Forma Pauperis filed.

February 12, 1973—Order entered granting certificate of probable cause; order entered granting motion to proceed in forma pauperis on appeal.

February 12, 1973—Petitioner's Motion for Stay Proceedings in Circuit Court of Fairfax County filed.

February 16, 1973—Order entered Denying Petitioner's Motion for Stay of Proceedings.

August 27, 1973—Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FRANK XAVIER FRANCISCO
Full name and prison number (if any) of Petitioner (prison no. 96916)

—vs—

J. S. GATHRIGHT, Superintendent Bland Correctional Farm, Route 2, Bland, Virginia 24315
Name and Title of Respondent

Case. No. 430-72-A-M
(To be supplied by the Clerk of the District Court)

PETITION FOR WRIT OF HABEAS CORPUS

[Filed Oct. 31, 1972, Clerk, U. S. District Court, Alexandria, Virginia]

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it must be legibly handwritten or typewritten, signed by the petitioner and verified (notarized). It must set forth in a brief and clear form the answers to each applicable question. (If any question is not applicable, indicate by writing "None" or "Not Applicable". If you do not know the answer to any question, indicate by writing "Unknown".)

You must state *all* of your grounds for relief. If you fail to include any ground for relief which you now know about, you may lose your right to present it to any federal court in the future. If the form does not provide enough space for a complete answer to any particular question, you may finish your answer to that question on the reverse side of the page or on an additional page. You must make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Therefore, you must take care to assure that all answers are true and correct.

If you are not a pauper, you must pay the filing fee of $5.00 by check or money order payable to the Clerk, U. S. District Court.

If you cannot pay the filing fee, you may seek to proceed *in forma pauperis*. In this case you must complete the affidavit (attached at the back of this form) setting forth information which establishes that you are unable to pay the fees and costs of the habeas corpus proceeding.

When the petition is completed, the original and two copies should be mailed to the Clerk of this Court. You may keep the fourth copy.

Place of Detention:

Your petitioner, Frank Xavier Francisco, is now actually unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the Commonwealth of Virginia at *Bland Correctional Farm, Bland, Virginia 24315*, in the custody of *J. S. Gathright, Superintendent*.

A. Criminal Trial

1. Give the name and location of the court which imposed the sentence or sentences from which you seek relief.

The sole claim and authority by virtue of which the petitioner is restrained of his liberty is a judgment, and a committment issued thereunder, of the *Circuit Court of Fairfax County, a court of the Commonwealth of Virginia, within this judicial District, located at 4000 Chain Bridge Road, Fairfax County, Virginia 22030*, which judgment was rendered in connection with criminal case No. 16,767.

2. State the offense or offenses for which sentence was imposed.

The offense for which sentence was imposed was set forth in an indictment (a copy of which is attached hereto as Exhibit A) returned on the 17th day of May, 1971 and charging that petitioner, on the 28th day of February, 1971, in the County of Fairfax did *unlawfully and feloniously, knowingly or intentionally possess with intent to distribute, a controlled drug, to wit: heroin, in violation of Section 54-524.101(a) of the 1950 Code of Virginia, as amended*.

3. State the date on which the sentence was imposed and the length of the sentence. (If more than one sentence was imposed, state whether they are consecutive (to be served

one after another) or concurrent (all to be served at the same time).)

On or about the *28th day of May, 1971,* the petitioner was sentenced to *eight years* in the state penitentiary at hard labor.

4. Check which plea you made:

GUILTY	NOT GUILTY
	X

5. If your plea was "Not Guilty," were you convicted by a judge or a jury?

Judge	Jury
	X

6. Did you appeal the conviction? *Yes* [by way of Petition For Writ of Error following a Notice of Appeal and Assignments of Error (a copy of which is attached hereto as Exhibit B).]

7. If you answered "yes" to question 6, list:

the name of each court to which you appealed or sought reversal

Supreme Court of Virginia

the result in each appellate court and the date of the result:

On or about the 14th day of December, 1971, the Supreme Court of Virginia rendered an opinion (a copy of which is attached hereto as Exhibit C) that there was no reversible error in the judgment complained of, and being of that opinion, rejected the Petition for Writ of Error and refused the writ of error and supersedeas, the effect of which was stated to affirm the judgment of the Circuit Court of Fairfax County.

8. State the reasons why your conviction or sentence is unlawful. Include facts. You must state all the claims which you know about. Be as brief as possible; if enough space is not provided on this page for your answer, you may complete your answer on the reverse side of this page or on an additional page.

A. Your petitioner states that the aforesaid judgment and commitment are void and without authority of law, the court rendering and issuing the commitment was without jurisdiction to do so, and the imprisonment of the petitioner

is in violation of the Constitution of the United States as hereinafter shown.

B. By reason of the nature of the charge under which petitioner was tried, i.e. possession of heroin with intent to distribute, there could have been no conviction had certain hereinafter specified foil packets and testimony relating thereto not been introduced into evidence over petitioner's objection.

C. On the 18th day of May, 1971, petitioner's counsel filed a Motion to Supress Evidence (a copy of which is attached hereto as Exhibit D) including these packets. A hearing on the motion was held on 21 May 1971 before the Honorable Burch Millsap, Circuit Court of Fairfax County. The court took the motion under advisement, and on May 28, 1971, the date of petitioner's trial, the court, having received a Memorandum of Points and Authorities in Support of the Motion (a copy of which memorandum is attached hereto as Exhibit E), permitted introduction into evidence of these packets. (The transcript of the May 21, 1971 hearing on the Motion to Suppress Evidence is hereinafter designated as *M. Tr.* ——; the transcript of the May 28, 1971 proceedings is hereinafter designated as *T. Tr.* ——.)

D. Petitioner has contended at every stage of the state proceedings following his arrest, and does contend herein, that the introduction of the foil packets and testimony relating thereto into evidence is a violation of due process of law in contravention of his rights under the Fourth and Fourteenth amendments to the Constitution of the United States [see Exhibit E] insofar as:

First: The arrest and search that produced the foil packets occurred without probable cause;

Second: Even if probable cause had existed, the aforesaid arrest and search were illegal, having been predicated upon a forcible entry of petitioner's dwelling without a warrant, and having occurred in the absence of exigent circumstances.

Third: Notwithstanding the questions of probable cause and forcible entry of a dwelling without a warrant, the permissible scope of a search and seizure incident to the petitioner's arrest was exceeded.

E. In relation to the contentions listed in paragraph 8D above, the following circumstances surrounding the aforementioned introduction into evidence are submitted:

(a) On February 27, 1971, the Fairfax County Police Department received information from one Robert De Bruin that petitioner had heroin and was "cutting it up" for distribution. (*M. Tr.* 20).

(b) No specific evidence of the reliability of the informer De Bruin was presented to any court.

(c) The Commonwealth attempted to show that the arresting Officer Luzi reasonably believed De Bruin to be reliable through a mere allegation by Officer Luzi that De Bruin had been reliable in the past (*M. Tr.* 8) and that the police had received complaints somehow relating to defendant (*M. Tr.* 7).

(d) Officer Luzi did not specify the nature of these complaints or how they concerned the defendant, and was unable to recall the time relation between the informer's alleged earlier reliable information and the night in issue (*M. Tr.* 8).

(e) In connection with a challenge to the informer's reliability (and thus to the existence of probable cause), it was shown that the informer De Bruin was known to Officer Luzi as a drug addict (*M. Tr.* 18), had been arrested by Officer Luzi for sale of heroin (*M. Tr.* 17-18), and was acting as an informer knowing that his activity in this regard would be brought to the prosecutor's attention (*M. Tr.* 19).

(f) In connection with a challenge to the informer's reliability (and thus to the existence of probable cause), petitioner's counsel was not permitted to elicit Officer Luzi's testimony with respect to the reliability of addicts generally (*M. Tr.* 20).

(g) Sometime near midnight and after receipt of the aforesaid information set forth in paragraph 8E(a) above, Officer Luzi accompanied De Bruin and others to the garden apartment occupied by petitioner.

(h) De Bruin entered the apartment, and the arresting officer observed the apartment interior from the patio through a thin curtain over a window.

(i) It was arranged that De Bruin would give petitioner sixty dollars in marked funds if De Bruin observed heroin for sale in the apartment, and De Bruin was to then lock himself in the bathroom to prevent its disposal.

(j) Officer Luzi did not intend to arrest petitioner in the absence of a signal from the informer as previously arranged (*M. Tr.* 22).

(k) No evidence was presented that De Bruin ever saw heroin for sale in the apartment.

(l) While in the apartment, De Bruin conversed with petitioner and gave petitioner ten dollars owed to petitioner (*T. Tr.* 38).

(m) In urging support for the existence of probable cause by reason of corroboration of the informer's information through personal observation of Officer Luzi, the Commonwealth of Virginia relied upon the Officer's trial testimony (much after the motion to suppress was denied) that he felt that he had observed a sales transaction.

(n) No evidence was presented that the officers observed anything but the conversation and the ambiguous act of the passage of money which was in fact the debt payment.

(o) After observing these events, Officer Luzi and other officers knocked at the apartment door. With the chainlock remaining secured, Robert Geisler, another occupant of the apartment, opened the door. The officers broke the chainlock to enter the apartment following Geisler's attempt to close the door when the officers identified themselves. In the bedroom, Officer Luzi with his gun drawn, confronted petitioner, ordered him to lie on the floor at the foot of the bed, and searched him (*T. Tr.* 20).

(p) Both the arrest and search occurred without a warrant.

(q) A Justice of the Peace is available near the jail at all times and was in fact available when petitioner was brought in after his arrest. (*M. Tr.* 24).

(r) No evidence of exigent circumstances giving rise to the need for a forcible entry into the dwelling without a warrant was presented to the Court; Officer Luzi simply stated that he was concerned with his accountability for the sixty dollars in marked funds (*M. Tr.* 24).

(s) In Brief in Opposition to the aforementioned Petition For Writ of Error identified in paragraph 6 above, the Commonwealth of Virginia argued that exigencies are created solely because narcotics are thought to be involved.

(t) Officer Luzi found 10 foil packets in petitioner's pants pocket, 38 foil packets on the desk next to the bed, and some marked money on the floor adjacent the dresser.

(u) In connection with the scope of the search and as to the 38 foil packets on the desk, Officer Luzi testified that he believed they were out of petitioner's reach when petitioner

was secured, face down on the floor under cover of the officer's gun.

(v) Further, there was no evidence presented that the packets were readily and clearly distinguishable as contraband.

F. Petitioner has contended in the state court proceedings and does here contend, that the statute under which he was convicted is unconstitutional, (at least as applied to him) a denial of due process of law in contravertion of his rights under the Fourteenth Amendment to the Constitution of the United States, particularly insofar as it provides in Va. Code § 54-524.101(a) that conviction "may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

G. In relation to the contention set forth in paragraph 8F above, the following factual submissions are made:

(a) There was evidence presented that petitioner at the time of his arrest was addicted to narcotics and had a narcotics habit in an amount equivalent to the daily use of up to 12 of the packets introduced into evidence (*T. Tr.* 119).

(b) No evidence was presented as to the reasonableness of the statutory presumption of an intent to distribute in regard to a four to eight day supply in the hands of an addict.

(c) Petitioner's counsel was not permitted to question a witness (McMillan), who was a former heroin addict (*T. Tr.* 104-105), as to whether narcotics addiction was of a compulsive nature (*T. Tr.* 112-113) so as to form a basis for an instruction on pharmacological duress despite the statutorily permitted presumption.

(d) Requested instruction no. 4 was refused (*T. Tr.* 133) and at the same time an instruction on statutorily permitted presumption was given.

C. State Habeas Corpus

9. Before filing this petition, did you file in connection with the sentence or sentences of which you complain any petition for habeas corpus in a state court.

No. (Your petitioner has, however, exhausted the remedies available in the courts of the Commonwealth of Virginia, within the meaning of 28 U.S.C. § 2254, insofar as each and every issue, claim and ground set forth in part 8 above was presented and adversely determined at his trial

and was asserted as reversible error in the aforesaid Petition For Writ of Error, identified in paragraph 6 above.

10. If you answered "yes" to question 9, list with respect to each such petition the name and location of the court in which each was filed, and the date when you filed each petition:

Not Applicable

the result of each petition and the date of the result:

Not Applicable

11. Did you appeal from the disposition of your petition for habeas corpus in the state court?

Not Applicable

12. If you answered "yes" to question 11, list the name of each court to which you appealed or sought reversal

Not Applicable

the result and date in each appellate court:

Not Applicable

D. Previous Federal Habeas Corpus

13. Before filing this petition, did you file with respect to the sentence or sentences of which you complain any previous petition for habeas corpus in any Federal court?

No. (If your answer to this question is "no", you do not need to answer questions 14 through 16).

14. If you answered "yes" to question 13, list with respect to each such petition the name and location of the court in which each was filed:

Not Applicable

the result of each petition and the date of the result:

Not Applicable

15. Did you appeal from the action on the previous petition?

Not Applicable

16. If you answered "yes" to question 15, list the name of each court to which you appealed or sought reversal.

Not Applicable

the result in each court and the date of that result:

Not Applicable

/s/ Daniel C. Kaufman

DANIEL C. KAUFMAN
6018 Craig Street
Springfield, Virginia 22150

Of Counsel:
Joel M. Freed
644 Timberbranch Parkway
Alexandria, Virginia

/s/ Francis Xavier Francisco
Petitioner's Signature

State of Virginia
City/County of Bland

The above named petitioner, being first duly sworn, says that he has signed the foregoing petition, and that every statement contained therein is true and correct, to the best of his knowledge and belief and that, to the best of his knowledge, all grounds for relief from the sentence or sentences complained of are set forth herein.

/s/ Francis Xavier Francisco
Petitioner's Signature

Subscribed and sworn to before me this 26 day of September, 1972.

Illegible name My commission expires: August 4.
Notary Public

The petition will not be filed without payment of court costs unless the petitioner is entitled to proceed in forma pauperis and has executed the affidavit on page 5. (See instructions, page 1).

[In Forma Pauperis Affidavit and Exhibits A-E Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

[Caption Omitted in Printing]

ANSWER

Now comes the respondent, by counsel, and for his answer to the petition for writ of habeas corpus, says as follows:

1. Petitioner is now being detained pursuant to a judgment of the Circuit Court of Fairfax County, Virginia, of May 28, 1971, wherein the petitioner was convicted of possession of a controlled drug with intent to distribute and sentenced to a term of eight years in the Virginia State Penitentiary. (See Exhibit I, copy of prison record.)

2. The allegations of the petition herein appear to be as follows:

(a) Illegal search and seizure.
(b) Unconstitutionality of the statutory presumption relating to possession with intent to distribute.

3. Respondent says that petitioner appealed his conviction to the Virginia Supreme Court, and his petition for writ of error was denied and his conviction affirmed by an Order entered December 14, 1971. (See Exhibit II, copy of petition for writ of error, and copy of brief in opposition.) Respondent admits that both of the allegations of the petition herein were raised in said petition for writ of error, and therefore, petitioner has exhausted his State court remedies.

4. As to allegation (a) of the petition herein relating to illegal search and seizure, respondent denies that the arrest of the petitioner and the subsequent search and seizure without a warrant was invalid or illegal, and therefore, the admission of evidence obtained thereby was not improper. Respondent says that the arresting officer had probable cause to make the arrest, and that the subsequent search and seizure was valid as being pursuant to a lawful arrest. The probable cause was grounded on information received from an informer who was identified and who had given reliable information in the past, as well as who had dealt with the petitioner on previous occasions relating to his illegal activities. Furthermore, the arresting officer had an opportunity

to observe the defendant in action, and when police officers attempted to enter the petitioner's premises, their entry was barred in a very suspicious manner.

5. As to allegation (b) of the petition herein, respondent admits that said allegation would appear to have merit in light of *Sharp* v. *Commonwealth*, — Va. — (October 9, 1972). Under the holding in *Sharp*, it would appear that the granting of Instruction G in the petitioner's trial constituted reversible error, and petitioner would be entitled to a new trial. Respondent says further, however, that it should be left up to the State courts to determine whether the petitioner's case is controlled by *Sharp* or whether there are sufficient facts to differentiate or distinguish petitioner's case from *Sharp*. Respondent says, therefore, that as to this allegation, the petition should be dismissed without prejudice to allow the petitioner to proceed in the State courts on said allegation. *Stonebreaker* v. *Smyth*, 163 F.2d 498 (4th Cir. 1947).

6. Respondent denies each and every allegation of the petition not specifically admitted herein.

7. Respondent says that arrangements are being made to forward to this Court the records of petitioner's State court trial.

WHEREFORE, respondent prays that the petition be denied and dismissed.

JOHN S. GATHRIGHT,
Superintendent of
Bland Correctional Farm

By GILBERT W. HAITH
Counsel

Gilbert W. Haith
Assistant Attorney General
911 East Broad Street
Richmond, Virginia 23219

[Certificate of Service and Exhibits I & II
Omitted in Printing]

[COMPLAINT AND ARREST WARRANT]

COMMONWEALTH OF VIRGINIA, COUNTY OF FAIRFAX, TO-WIT

COMPLAINT

I, Inv. Luzi, whose address is Fairfax Co. Police do hereby complain that on the 28 day of Feb. 1971, Frank Xavier Francisco did unlawfully & feloniously and knowingly possess a control drug with the intent to dispense heroin in viol. of Sec. 54-524-101A of the 1950 Code of Va. as amended.

Given under my hand this the 28 day of Feb., 1971.

Inv. Luzi
Complainant

Subscribed and sworn to before me this the 28 day of Feb., 1971.

James E. Moeller
Justice of the Peace

WARRANT OF ARREST

To the Sheriff, Special Policeman, or to any County Police Officer or State Police Officer, Greeting:

Whereas, complaint has been made on oath to me, the undersigned Justice of the Peace for the County aforesaid, on the information of Inv. Luzi, that on the 28 day of Feb., 1971, in the County aforesaid Frank Xavier Francisco did unlawfully, feloniously and knowingly possess a control drug with the intent to dispense heroin in viol. of Sec. 54-524-101A of the 1950 Code of Va. as amended.

These are therefore in the name of the Commonwealth, to command you forthwith to apprehend and bring before the Fairfax County Court, the body of said Frank Xavier Francisco at Fairfax, Va. on the 8 day of April, 1971, at 10:00 o'clock A.M., to answer the said complaint, and to be further dealt with according to law. And have then and there this wararnt, with your return thereon.

Given under my hand this 28 day of Feb., 1971.

/s/ James E. Moeller
Justice of the Peace for Fairfax County, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA vs. FRANK XAVIER FRANCISCO	Indictment for Possession of a Controlled Drug with Intent to Distribute

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its May Term, 1971, upon their oaths present that Frank Xavier Francisco, on the 28th day of February, 1971, in the County of Fairfax, did unlawfully and feloniously, knowingly or intentionally possess with intent to distribute, a controlled drug, to-wit: heroin, in violation of Section 54-524.101(a) of the 1950 Code of Virginia, as amended, against the peace and dignity of the Commonwealth.

Witnesses called by the Court,
sworn and sent to testify
before the Grand Jury:

Inv. Luzi, Fairfax County Police Dept.

Teste: This 17th day of May, 1971

W. FRANKLIN GOODING
Clerk of said Court

By EDWARD E. YOUNG

A TRUE BILL. ☒
NOT A TRUE BILL. ☐

/s/ Illegible
Foreman

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA v. FRANK FRANCISCO	Cr. No. 16-767

MOTION TO SUPPRESS EVIDENCE

[Filed May 18, 1971, W. Franklin Gooding, Clerk of the Circuit Court of Fairfax County, Va.]

Defendant, by counsel, moves this Honorable Court to suppress evidence seized from defendant's person and residence on or about 28 February 1971 by Inspector William Luzzi and other officers and agents of the Fairfax County Police Department. Defendant requests that the tangible evidence seized and any testimony relating thereto be excluded from admission in any trial or trials of the above identified case.

As grounds for this motion, counsel states that the evidence is the fruit of a warrantless arrest and search not based on probable cause or required by exigent circumstances, and includes defendant's personal papers. This evidence was therefore seized in violation of defendants rights under the Fourth and Fifth Amendments of the United States Constitution and under Section 8 of the Virginia Constitution. Such evidence may not be used by the Commonwealth, directly or indirectly.

Respectfully submitted,
/s/ Daniel C. Kaufman
DANIEL C. KAUFMAN
4600 S. Four Mile Run Dr.
Arlington, Virginia 22204
671-0942

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

[Caption Omitted in Printing]

[ORDER TAKING MOTION TO SUPPRESS EVIDENCE UNDER ADVISEMENT]

This 21st day of May, 1971, came the Commonwealth, by her Attorney, and the defendant, FRANK XAVIER FRANCISCO, who stands indicted for a felony, to-wit: possession of a controlled drug with intent to distribute, being confined in jail, was brought into Court and put to the bar of the Court in custody of a Deputy Sheriff, and also appeared Daniel Kaufman, Counsel for the defendant.

Thereupon, the Court Reporter was sworn.

And this case came on to be heard on the Motion to Suppress Evidence filed herein in writing by Counsel for the defendant. The Court proceeded to hear evidence and argument of Counsel, and in consideration whereof, the Motion to Suppress is hereby taken under advisement.

And the defendant is remanded to jail.

/s/ Burch Millsap
Judge

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

[Caption Omitted in Printing]

[ORDER DENYING MOTION TO SUPPRESS EVIDENCE]

And it appearing to the Court that the Motion to Suppress was taken under advisement on May 21, and in consideration of the evidence heard and memoranda of law submitted by Counsel, the said Motion to Suppress is hereby denied.

Entered: May 28, 1971

/s/ Burch Millsap
Judge

[Letter Opinion Denying Motion to Suppress Evidence]

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
May 28, 1971.

Mr. Ian M. Rodway,
Assistant Commonwealth's Attorney,
Fairfax, Virginia. 22030

Mr. Daniel C. Kaufman,
Attorney at Law,
4600 S. Four Mile Run Drive,
Arlington, Virginia.

Re: *Commonwealth v. Francisco.*

Gentlemen:

I have read the memoranda of law submitted and the Court is of the following opinion:

The entry by the Fairfax County Police Officer and the arrest of the defendant without a warrant is valid. The police officer had probable cause to make the arrest for the felony. The facts given to the police officer, together with the pre-arranged signal of the informer, were sufficient for the arrest without a warrant.

The entry by the police was not prior to making their identity known but after and also after informing the party opening the door of his arrest and also after the party opening the door attempted to block the same. (T. p. 13)

The police officers exceeded the permissible area of search without a warrant and all evidence obtained outside the permissible area of search will be excluded at the time of trial.

The motion to suppress is denied, except as to the evidence obtained beyond the area of the defendant's immediate control.

Very truly yours,
Burch Millsap.

BM :elc

[Extract from Transcript of Jury Trial]

[1] VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA, PLAINTIFF, vs. FRANK XAVIER FRANCISCO, DEFENDANT.	Docket No. 16767

Circuit Courtroom No. 2,
Fairfax County Courthouse,
Fairfax, Virginia,
Friday, May 28, 1971

The above-entitled cause came on for hearing before the HONORABLE BURCH MILLSAP, Judge of the Circuit Court of Fairfax County, Virginia, at 10:00 a.m.

APPEARANCES:

On behalf of the Commonwealth:

IAN M. RODWAY, ESQ.,
Assistant Commonwealth Attorney

On behalf of the Defendant:

DANIEL C. KAUFMAN, ESQ.

• • • •

[138] *INSTRUCTION NO. 6*

The Court instructs the jury that a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug unlawfully possessed.

• • • •

[Court Reporter's Certificate Omitted in Printing]

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

[Caption Omitted in Printing]

[JUDGMENT OF CONVICTION]

This 28th day of May, 1971, came the Commonwealth, by her Attorney, and the defendant, FRANK XAVIER FRANCISCO, who stands indicted for a felony, to-wit: possession of a controlled drug with intent to distribute, being confined in jail, was brought into Court and put to the bar of the Court in custody of a Deputy Sheriff, and also appeared Daniel Kaufman, Counsel for the defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the defendant was arraigned upon the indictment returned herein, to which indictment the defendant, in person, entered a plea of not guilty.

Whereupon came a jury of twenty veniremen who were sworn on their voir dire, and the Attorney for the Commonwealth struck four names from said panel and Counsel for the defendant elected to strike only two names from said panel. Whereupon the following twelve jurors, to-wit: Charles F. Askey, John N. Crawford, Jene Crisman, Esley R. Davis, Richard F. Dittman, Roger J. Finch, William L. Flynn, Robert L. Gorman, Max C. Harman, Samuel R. Hawkins, John Makarczyk and Toussaint E. Summers were chosen by lot from the remaining fourteen names; and were sworn the truth of and upon the premises to speak.

Counsel for the defendant, out of the presence of the jury but in the presence of the defendant, renewed his motion to suppress made prior to trial, which motion the Court after hearing argument thereon, denied.

Whereupon the Court proceeded to hear opening statement on behalf of the Commonwealth and all the evidence on behalf of the Commonwealth, and upon conclusion of the evidence presented, Counsel for the defendant, out of the presence of the jury but in the presence of the defendant, made a motion to strike the evidence presented on behalf of the Commonwealth, which motion the Court after hearing argument thereon, denied.

The jury was recalled and heard opening statement on behalf of the defendant and all the evidence on behalf of the defendant.

The jury then received instructions of the Court, heard argument of Counsel and were sent to their room to consult

upon their verdict and after some time returned into Court and rendered the following verdict, to-wit:

"We, the jury, on the issue joined in the case of Commonwealth of Virginia vs. Frank Xavier Francisco, defendant, find the defendant guilty of possession of a controlled drug heroin with intent to distribute and fix his punishment at eight years.

/s/ Charles F. Askey
Foreman".

Whereupon, the jury was discharged.

Then Counsel for the defendant made a motion that this case be referred to the District Probation Officer for his investigation and report before sentencing, which motion the Court after hearing argument thereon, denied.

Thereupon, it was demanded of him, FRANK XAVIER FRANCISCO, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that FRANK XAVIER FRANCISCO do serve eight (8) years in the Penitentiary House of this Commonwealth, at hard labor.

The Court proceeded to advise the defendant of his right to appeal from the sentence imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

And the defendant having noted his intention to apply to the Supreme Court of Appeals for a writ of error, it is ADJUDGED and ORDERED that the execution of the sentence be, and the same hereby is postponed for a period of thirty days from this date to permit the defendant to be present and assist his Counsel in seeking such writ of error. It is further ADJUDGED and ORDERED that at the expiration of such thirty day period the defendant shall be conveyed to the Penitentiary in the manner provided by law, unless in the meantime he shall be let to bail.

The defendant shall be given credit for ninety (90) days served in jail.

The fee of the Court Reporter who recorded the evidence and incidents of trial in this case is hereby assessed as costs

in this case as provided by Sec. 17-30.1 of the 1950 Code of Virginia, as amended.

The Court certifies that the defendant was present at all stages of this trial.

And the defendant is remanded to jail to await transportation to the Penitentiary.

/s/ Burch Millsap
Judge

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

[Caption Omitted in Printing]

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO: W. FRANKLIN GOODING, ESQ.
Clerk, Circuit Court of Fairfax County
Fairfax, Virginia 22030

NOTICE IS HEREBY GIVEN that Frank Xavier Francisco appeals from a judgement entered upon a jury verdict by this Court on 28 May 1971 and announces his intention of applying for a writ of error to the Supreme Court of Appeals of Virginia.

ASSIGNMENTS OF ERROR

Defendant, by counsel, assigns as errors the following rulings of the Court:

1. The Court erred in holding that it had no jurisdiction to entertain a Motion to Suppress Evidence subsequent to a preliminary hearing binding Defendant over to the Grand Jury but prior to indictment.

2. The Court erred in restricting defense counsel's cross-examination of Officer William Luzi at the hearing on Defendant's written motion to Suppress Evidence on 21 May 1971 by refusing to permit counsel to question Officer Luzi concerning his opinion as to the reliability of drug addicts.

3. The Court erred in denying in part Defendant's written Motion to Suppress Evidence on 28 May 1971.

4. The Court erred in denying in part Defendant's oral Motion to Suppress Evidence on 28 May 1971.

5. The Court erred in ruling that a plastic bag containing 38 foil decks of heroin was within the area of defendant's immediate control at the time of its seizure.

6. The Court erred in permitting Officer William Luzi to testify concerning events of 27 and 28 February 1971 taking place adjacent to and within Defendant's apartment.

7. The Court erred in permitting Thaddeus E. Tomczak to testify as the Commonwealth's Chemist.

8. The Court erred in admitting into evidence Commonwealth's Exhibits 1-5.

9. The Court erred in permitting Robert DeBruin to testify as to alleged prior sales of narcotics not resulting in Defendant's arrest or conviction.

10. The Court erred in denying Defendant's Motion to Strike the Commonwealth's Evidence.

11. The Court erred in restricting defense counsel's direct examination of Stephen McMillan by refusing to permit counsel to question Mr. McMillan concerning the incidents and consequences of narcotics addiction.

12. The Court erred in giving Instruction F.

13. The Court erred in giving Instruction G.

14. The Court erred in refusing to give Instruction No. 4, as originally proffered.

15. The Court erred in refusing to give Instruction No. 4, as modified.

16. The Court erred in denying Defendant's motion to refer the case to the case to the probation officer for an investigation and report prior to imposition of sentence.

Respectfully submitted,

/s/ Daniel C. Kaufman
DANIEL C. KAUFMAN
Attorney for Defendant
2304 N. Kenmore Street
Arlington, Virginia 22207

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

FRANK XAVIER FRANCISCO,
APPELLANT

vs.

COMMONWEALTH OF VIRGINIA,
APPELLEE

Criminal No.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS (See p. 40)

DANIEL C. KAUFMAN
2304 N. Kenmore Street
Arlington, Virginia 22207

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF VIRGINIA

Appellant, Frank Xavier Francisco, is aggrieved by a final judgement entered by the Circuit Court of Fairfax County on 28 May 1971, in a proceeding wherein the appellant, Frank Xavier Francisco, was defendant and the Commonwealth of Virginia was plaintiff.

STATEMENT OF PROCEEDINGS

Defendant, Frank Xavier Francisco, was arrested on 28 February 1971 and charged with the felony of possession of a controlled drug (heroin) with intent to distribute, in violation of section 54-524.101(a) of the Code of Virginia of 1950 as amended.

A preliminary hearing was held on 8 April 1971 before the Honorable J. Mason Grove, Fairfax County Court. Defendant was bound over for the Grand Jury next meeting on 17 May 1971.

On 16 April 1971, defense counsel filed, in the Circuit Court of Fairfax County, a Motion to Suppress Evidence and scheduled a hearing thereon for 7 May 1971. On 7 May the motion came on for hearing before the Honorable William G. Plummer, Fairfax County Circuit Court. Prior to the presentation of evidence, the Court heard argument as to its jurisdiction. The Court held that, prior to indictment, it lacked jurisdiction to entertain the motion.

An indictment was returned by the Grand Jury on 17 May 1971 charging defendant with possession of a controlled drug, to-wit: heroin, in violation of section 54.524.101(a) of the Code of Virginia of 1950, as amended.

On 18 May 1971 defense counsel filed, in the Circuit Court of Fairfax County, a Motion to Suppress evidence. A hearing on the motion was held on 21 May 1971 before the Honorable Burch Millsap, Fairfax County Circuit Court. Officer William Luzi, Fairfax County Police Department was the only witness. Defense counsel was not permitted to elicit Officer Luzi's opinion as to the reliability of drug addicts or users generally. After presentation of evidence and argument, the Court took the motion under advisement. On 28 May 1971, the Court denied the motion in part, holding that only evidence seized outside the defendant's immediate control would be excluded at trial.

On 28 May 1971, a jury trial commenced before Judge Millsap. Defendant's motion to suppress was orally renewed and denied. A hearing was held outside of the presence of the jury to determine what evidence would be excluded under the ruling on the suppression motion. Following testimony by Officer Luzi, the Court ruled that 10 foil packets of alleged heroin found in defendant's pocket and 38 foil packets of alleged heroin found on a desk in the bedroom would not be excluded.

The Commonwealth called Robert DeBruin, a police informer, Thaddeus E. Tomczak, a forensic chemist, and Officer Luzi. Robert DeBruin was permitted to testify that on occassions prior to the offense charged, defendant had sold heroin to him. Thaddeus Tomczak testified as to his analysis of the foil packets' contents. Officer Luzi testified as to the defendant's arrest and the events leading thereto, and to the seizure of the foil packets. The Commonwealth moved into evidence a photograph of a desk in defendant's bedroom (Exhibit 1), an evidence envelope containing 10 foil packets of heroin (Exhibit 3), an evidence containing 38 foil packets of heroin (Exhibit 2), a chemist's report on the contents of the foil packets (Exhibit 4), and two transmittal envelopes (Exhibit 5).

At the close of the Commonwealth's case, defense counsel moved to strike the Commonwealth's evidence, principally on the ground that the Commonwealth had failed to introduce any competent evidence of venue; the motion was denied.

Stephen McMillan was the sole defense witness. Defense counsel was not permitted to examine him as to the incidents and consequences of drug addiction. He testified that defendant was addicted to heroin.

The Commonwealth and defense proffered instructions. The Court ruled that all of Commonwealth's instructions would be given; and that all of defense counsel's instructions, except number 4, would be given. Defense counsel requested the Court to give instruction 4 modified by deleting the second paragraph thereof; the request was denied.

Following instructions and final arguments the jury retired and later returned a verdict of guilty as charged with a sentence of eight years confinement.

Defense counsel moved to refer the case to the probation office for a pre-sentence investigation and report. The mo-

tion was denied and sentence imposed. Execution of the sentence was stayed pending perfection of an appeal.

ERRORS ASSIGNED

1. Holding by the Court that it had no jurisdiction to entertain a motion to suppress evidence subsequent to a preliminary hearing but prior to indictment.

2. Restriction by the Court of defense counsel's cross-examination of Officer Luzi at the hearing on Motion to Suppress Evidence by refusing to permit counsel to elicit Officer Luzi's opinion as to the reliability of drug addicts and users generally.

3. Denial of Defendant's Motion to Suppress Evidence on 28 May 1971.

4. Denial of defendant's oral motion to suppress evidence on 28 May 1971.

5. Ruling that a plastic bag containing 38 foil packets of heroin was within the area of defendant's immediate control at the time of its seizure.

6. Permitting Officer Luzi to testify concerning events of 27 and 28 February 1971 taking place adjacent to and within defendant's apartment.

7. Permitting Thaddeus E. Tomczak to testify as the Commonwealth's chemist.

8. Admitting into evidence Commonwealth's Exhibits 1-5.

9. Permitting Robert DeBruin to testify as to alleged prior narcotics sales by defendant not resulting in arrest or conviction.

10. Denying defendant's motion to strike the Commonwealth's evidence.

11. Restriction of defense counsel's direct examination of Stephen McMillan by refusing to permit counsel to question him concerning the incidents and consequences of narcotics addiction.

12. Giving Instruction F.

13. Giving Instruction G.

14. Refusing to give Instruction 4, as originally proffered.

15. Refusing to give Instruction 4, as modified.

16. Refusing to refer the case to the probation office for an investigation and report prior to imposition of sentence.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Circuit Court had jurisdiction to entertain a motion to suppress evidence filed subsequent to a preliminary hearing binding defendant over to the Grand Jury but prior to indictment.

2. Whether defendant's warrantless arrest was based on probable cause.

3. Whether probable cause alone is sufficient to authorize a police officer to validly make a forcible entry into a dwelling to arrest a person therein without an arrest warrant.

4. Whether the warrantless, forcible entry of defendant's dwelling to effect his arrest was necessitated by exigent circumstances.

5. Whether the arresting officers exceeded the permissible scope of a search and seizure incident to defendant's arrest.

6. Whether, in a prosecution for possession of narcotics with intent to distribute, evidence of prior narcotics sales can be introduced absent a showing of nearness in time to the offense charged.

7. Whether a narcotics addict can be punished for the possession, in his home, of narcotics to supply his own habit.

8. Whether a jury must be instructed that drug addiction is not a crime, where there is evidence that defendant is a drug addict.

9. Whether the Commonwealth proved venue.

10. Whether the jury can be instructed that constructive possession of narcotics is sufficient to authorize a conviction under section 54-524.101(a) of the Code of Virginia of 1950, as amended, where the instruction defining the elements of the offense omits the statutory language "knowingly or intentionally."

11. Whether a conviction for possession of a controlled drug with intent to distribute may be based solely on evidence as to the quantity of the drug possessed.

12. Whether it is proper to instruct the jury that conviction for possession of a controlled drug with intent to distribute may be based solely on evidence as to the quantity of the drug possessed.

13. Whether the limitation of mandatory reference to the probation office for investigation and report contained in section 53-278.1 of the Code of Virginia of 1950, as amended, to cases not tried by a jury is Constitutional.

14. Whether the Court abused its discretion by refusing to refer the case to the probation office for an investigation and report prior to sentencing.

STATEMENT OF FACTS

On 27 February 1971, Officer Luzi of the Intelligence Squad, Fairfax County Police Department, received information from Robert DeBruin, an informer, that defendant allegedly had in his apartment one-quarter ounce of heroin and was in the process of "cutting it up" for distribution. DeBruin was known to Officer Luzi as a drug addict and had been arrested by Officer Luzi for sale of heroin. After his arrest, DeBruin was told by Officer Luzi that anything he did would be brought to the attention of the Commonwealth Attorney and that Officer Luzi would like his assistance. Officer Luzi was informed that DeBruin had arranged to purchase drugs from defendant later that night. At about midnight, DeBruin, accompanied by Officer Luzi, two other Fairfax County policemen and another informer went to the Grandview Apartments. Officer Luzi searched DeBruin and gave him sixty dollars in marked funds. It was arranged that DeBruin would give the defendant the money if he observed drugs in the open and would then lock himself in the bathroom to prevent their disposal.

DeBruin entered defendant's apartment while Officer Luzi observed the interior of the apartment from the patio through the thin curtains over the window. DeBruin and defendant had a conversation; DeBruin gave defendant ten dollars that he owed defendant. After observing these events, Officer Luzi and the other officers knocked at the door. It was opened by Robert Geisler, another occupant of the apartment, but the chain-lock remained secured. When the officers identified themselves and stated that Geisler was under arrest, he attempted to close the door. The officers broke the chain-lock to enter the apartment. Geisler was secured but not actually arrested. Officer Luzi, gun drawn, confronted defendant in the bedroom, ordered him to lie on the floor at the foot of the bed, and searched him. In defendant's pants pocket, Officer Luzi found 10 foil packets of heroin; on a desk next to the bed he observed a plastic bag containing 38 foil packets; on the floor adjacent a dresser he observed the marked money. He seized these items.

Defendant was taken to the Fairfax County Jail where he was processed and held in lieu of $10,000. bond. Officer Luzi had neither an arrest warrant for defendant's person nor a search warrant for the apartment at the time of the arrest. A Justice of the Peace is available near the jail at all times and was in fact available when defendant was brought in.

The Grandview Apartments is a garden apartment complex located along Columbia Pike between Jefferson Street and Carlyn Springs Road. The sign indicating the Arlington County—Fairfax County Border is located in the median strip of Columbia Pike between Jefferson Street and Carlyn Springs Road.

ARGUMENT AND AUTHORITY

• • • •

INTENT BASED ON QUANTITY

(Error 13)

The statute under which defendant was charged provides that conviction "may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed." Va. Code § 54-524.101(a). Instruction G, given over defense objection, paraphrases this language.

Counsel submits that the quoted statutory presumption is unconstitutional as a denial of due process, the giving of instruction G was thus error.

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Leary v. United States, 395 U.S. 6, 36 (1969) (footnote omitted). The singularly opaque language of the statute clouds this determination somewhat. The fact proved is the quantity of drug possessed; the fact presumed is the intent to distribute. Can it "be said with substantial assurance" that the intent to distribute "is more likely than not to flow from" the quantity of drug possessed, required for constitutionality under *Leary*? The answer is plainly no since the quantity, type, and form of drug varies in each prosecution. While not controlling, it should be noted that Fairfax

County Commonwealth Attorney Robert F. Horan, Jr. has stated that "the question remains as to whether this proviso . . . creates a valid presumption upon which a conviction could be based." Virginia State Bar Ass'n, *Criminal Justice Seminar*, VII-3 (Feb. 19, 1971).

Counsel further submits that giving instruction G was error in light of instructions already given. Instruction D described direct and circumstantial evidence; instruction E discussed circumstantial evidence and twice stated that conviction could be had "upon circumstantial evidence alone." At best, instruction G is an instruction on circumstantial evidence tied to particular direct evidence. Counsel concedes that with appropriate, competent evidence as to the range of dosage that could be expected for a particular drug, a jury could consider the quantity possessed as circumstantial evidence of an intent to distribute. However, "it is reversible error for a trial judge to single out for emphasis a part of the evidence tending to establish a particular fact." *Woods v. Commonwealth*, 171 Va. 543, 547-48, 199 S.E. 465, 467 (1938). In view of instructions D and E already given, it is urged that giving instruction G was error since it singled out for emphasis the quantity of heroin possessed.

• • • •

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

FRANK XAVIER FRANCISCO,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA,
APPELLEE.

} RECORD NO. .....

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ERROR

Robert F. Horan, Jr.
Commonwealth's Attorney for Fairfax County
Fairfax County Courthouse
Fairfax, Virginia 22030

Counsel for Appellee

Daniel C. Kaufman
2304 N. Kenmore Street
Arlington, Virginia 22207

Counsel for Appellant

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

FRANK XAVIER FRANCISCO,
APPELLANT,

VS.

COMMONWEALTH OF VIRGINIA,
APPELLEE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ERROR

To the Honorable Chief Justice and the Justices of the Supreme Court of Appeals of Virginia:

COMES NOW the Commonwealth in response to the Petition for Writ of Error filed herein by Frank Xavier Francisco and states that no error was committed in the Circuit Court of Fairfax County.

STATEMENT OF MATERIAL FACTS

Appellee in general agrees with the Statement of Facts in the Petition.

• • • •

ARGUMENT NINE

DID THE COURT ERR IN GIVING INSTRUCTION NO. 6 (T. TR. 138)?

Instruction No. 6 is the precise wording of a part of Section 54-524.101(a) of the 1950 Code of Virginia, as amended. The legislature, recognizing that one who distributes narcotics illegally presents a grave threat to the community, has seen fit to declare that possession of a quantity of a controlled drug may be used as the sole basis to convict one of possession with intent to distribute. It is submitted that this is a logical presumption and is not unconstitutional.

Moreover, in the case at bar there was far more evidence than the possession of forty-eight (48) packets of heroin. Defendant's prior sale to Robert DeBruin as well as the transaction on the night of his arrest were further factors which lead to his conviction of possession with intent to distribute.

• • • •

[Certificate of Service Omitted in Printing]

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 14th day of December, 1971.

The petition of Frank Xavier Francisco for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fairfax County on the 28th day of May, 1971, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner,
Clerk

By: Allen L. Lucy
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FRANK XAVIER FRANCISCO,
PETITIONER,

v.

J. S. GATHRIGHT, Superintendent
Bland Correctional Farm,
RESPONDENT.

CIVIL ACTION NO.
430-72-A-M

ORDER

[Filed Jan. 23, 1973, Clerk, U. S. District Court, Alexandria, Virginia]

Frank X. Francisco attacks his state conviction for failure to suppress the evidence in that he alleges his arrest occurred without probable cause absent exigent circumstances and that the subsequent search exceeded its permissible scope. Moreover, he contends that an unconstitutional instruction relating to possession of narcotics with intent to distribute was improperly submitted to the jury.

An examination of the transcript of the suppression hearing (M. Tr.) and trial (T. Tr.) reveals that on February 27, 1971, Robert DeBruin informed Officer Luzi of the Fairfax County Police Department that the petitioner, Frank X. Francisco, possessed heroin and was in the process of cutting it up for distribution. (M. Tr. 20, 21) DeBruin admitted that he personally had previously purchased drugs from Francisco and was invited to procure more that evening. (M. Tr. 21, 25) DeBruin, moreover, was known to Luzi as being a drug addict with two recent arrest charges still pending against him for the sale and control of narcotics. (M. Tr. 17, 18) Luzi contended that DeBruin had indirectly given reliable information in the past although he did not specify the nature of the earlier complaints. (M. Tr. 8, 20) He had also indicated to DeBruin that the latter's present assistance would be brought to the attention of the Commonwealth Attorney. [DeBruin even testified at the preliminary hearing that he acted as

an informer "to clear" himself of drug charges with the understanding that something might be done for him if he helped. (T. Tr. 49, 52)]

Relying upon the information obtained from DeBruin, Luzi arranged a meeting with him for midnight outside of Francisco's apartment. At that meeting DeBruin was instructed to obtain entrance into the apartment and endeavor to purchase drugs with marked money which he was given. The police positioned themselves outside of the window of the apartment with the understanding that an observation, as seen through the thin curtains, of the passing of money from DeBruin to Francisco would be a signal to show that narcotics were visible and accessible. (M. Tr. 8, 26) The arrest was then to be based on this prearranged signal, that is, the "pass," although it was not contended that anyone saw Francisco hand DeBruin anything in exchange for the marked bills and no testimony indicated that DeBruin had actually seen heroin for sale in the apartment at the time of the signal. (M. Tr. 22, 25) [As a matter of fact, DeBruin testified at the trial that the initial exchange of money observed by the police outside of the window was the payment of a prior debt for drugs and not a new purchase. (T. Tr. 38, 41)]

Soon after DeBruin entered the apartment he made the "pass" by the window which then prompted the police to enter the apartment to arrest Francisco. Another person met the police at the door and attempted to prevent them from entering. The police proceeded to push through the door and arrest the defendant in the back bedroom. They confiscated ten (10) decks of heroin on his person and thirty-eight (38) more on a bureau near him. (M. Tr. 12, 13)

Evidence obtained by a search in violation of a defendant's constitutional rights is inadmissible. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Therefore, before a warrantless arrest is deemed proper, the prosecution must establish that probable cause existed for the arrest and that exigent circumstances obviated the requirement to procure a magistrate's independent judgment. *Beck* v. *Ohio*, 379 U.S. 95, 97 (1964); *McDonald* v. *United States*, 335 U.S. 451, 456 (1948). The lawfulness of a warrantless arrest, however, cannot be based on the reliability of an unknown informer. *Katz* v. *Peyton*, 334 F. 2d 77 (4th Cir.), *affirming*, 232 F. Supp. 131 (E. D. Va.), *cert. denied*, 379 U.S. 915 (1964), *rehearing denied*, 379 U.S. 984 (1965). Corroboration of

"the essential particulars," though, by an investigation prior to arrest may be sufficient to establish probable cause. *United States* v. *Irby*, 304 F. 2d 280 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962).

In *Aguilar* v. *Texas*, 378 U.S. 108 (1964), the Court established a two-pronged test to measure the effect of an informant's reliability on a police officer's determination of probable cause. It must affirmatively appear to a neutral and detached magistrate that the officer was informed of some of the "underlying circumstances" from which it could be concluded that the informant was reliable and the information credible. There is a three-tiered method of analysis for testing the validity of an informant's conclusions. First, the information can be corroborated by the informant's knowledge of minute detail and particularity. Secondly, direct personal observation can assure first-hand knowledge of facts rather than mere suspicion or rumor. And finally, actual participation in the illegal activity carries its own degree of credibility since it is a declaration against penal interests.

Credibility and reliability can further be ascertained by an affiant's averment that the informant was known and has proven himself by having previously furnished other information which was instrumental in procuring convictions. Moreover, the affiant's own knowledge of the alleged suspect's reputation or subsequent observation of incriminating actions by the suspect may corroborate an informer's accusation. *See Spinelli* v. *United States*, 393 U.S. 410 (1969); *Manley* v. *Commonwealth*, 211 Va. 146, 176 S.E. 2d 309 (1970).

The standards where police act without a warrant are at least as stringent as those required for an affidavit. *Aguilar*, *supra*, at 111; *Whiteley* v. *Warden*, 401 U.S. 560 (1971); *McCray* v. *Illinois*, 386 U.S. 300, 305 (1967); *Wong-Sun* v. *United States*, 371 U.S. 471, 479 (1963). The mere existence of probable cause is not sufficient to justify noncompliance with the warrant procedure. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 451 (1971); *Angello* v. *United States*, 269 U.S. 20, 33 (1925). It is fully recognized that:

> The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." (Citations omitted.) *Coolidge*, *supra*, at 455.

In reviewing the evidence presented at the suppression hearing in the case at bar, the basic issue is when probable cause was sufficiently established. The only proof apparent, prior to the window observation, to support the two-prong test of *Aguilar* was the informant DeBruin's admission against his penal interests that he had purchased narcotics in the past from the suspect Francisco. (M. Tr. 21) *United States* v. *Harris*, 403 U.S. 573 (1971). Additionally, there was DeBruin's statement that Francisco had told him he had recently bought a quarter pound of heroin and would sell him some if interested. (M. Tr. 20, 25) [Another informer, Carcio, also told the police the same story but it carries no extra weight since his information came from DeBruin. (M. Tr. 9)] There was not, however, any testimony that DeBruin had personally observed narcotics on Francisco or in his apartment prior to entering his home the night of arrest.

Officer Luzi did make the bare statement that DeBruin, known only at that point as a drug addict, had "indirectly" given reliable information in the past. (M. Tr. 8) This did little to support the informant's credibility and reliability since he did not specify the nature of the underlying circumstances of the earlier complaints. (M. Tr. 17, 18, 20) There was no evidence either that the information supplied as to other cases was instrumental in securing any convictions. To establish credibility and reliability, more than a mere assertion that an informer has given reliable information before is needed to provide a factual basis for crediting his report. *United States* v. *Harris*, *supra*, at 579; *Riggan* v. *Virginia*, 384 U.S. 152 (1966); *Wiles* v. *Commonwealth*, 209 Va. 282, 163 S.E. 2d 595 (1968). While it is further recognized that a police officer's (or affiant) own knowledge of a suspect's reputation can corroborate the truthfulness of an informant's accusation, "a bald and unilluminating assertion of suspicion," standing alone, is entitled to no weight. *Spinelli*, *supra*, at 414; *Nathanson* v. *United States*, 290 U.S. 41, 46 (1933). Such was the case here since Luzi did not know

the suspect personally but only by way of some unexplained "police department complaints." (M. Tr. 7)

It is similarly difficult to find that the act of passing the money in front of the window in itself corroborated the veracity of DeBruin's initial assertions for there was no incriminating conduct on the part of the suspect. Moreover, an informer's tip cannot be sustained by activities which "contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip." *Spinelli, supra,* at 418; *Nathanson, supra.*

While each stage of material proof, standing alone, failed to substantiate a showing of probable cause the totality of circumstances affirmed such a finding. First the declaration against penal interests by DeBruin of his involvement in criminal activity carried its "own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a break does not eliminate the residual risk and opprobrium of having admitted criminal conduct." *Harris, supra,* at 583, 584. Luzi's statements, although vague, that DeBruin had given reliable information in the past and that some form of unspecified complaints had at least been received before on Francisco deserved some weight, if only slight, as being corroborative when balancing the probabilities. Finally, the passing of the money, when viewed by the police, served a legitimate purpose in that it was an action by DeBruin to *signal* to Officer Luzi that he, DeBruin, had now personally observed narcotics in Francisco's possession, an element not previously confirmed. (M. Tr. 8, 26) It is immaterial whether DeBruin had actually seen the drugs present or not, for what the police believed to be the interpretation of his signal is the subject of analysis. At this moment the test for the sufficiency of probable cause to arrest was ultimately fulfilled.

Whether the observation itself constituted an illegal search is another issue. Technically it was not a trespass to search the suspect or his premises but a procedure to enable the police to view a "signal" from the informant for the purpose of corroborating prior averments. It would have been no different than had the police waited for DeBruin to return from the apartment and confirmed his earlier allegation with direct personal knowledge. It is obvious that Francisco was not relying on the security of his apartment but rather upon his misplaced confidence that DeBruin would not reveal his wrongdoing. DeBruin was not a surreptitious observer but an invited guest who was knowingly given entry and the opportunity to view the contraband. *Hoffa* v. *United States,* 385 U.S. 293 (1966). *See also, United States* v. *White,* 401 U.S. 745 (1971). Since this observation was a method for executing a plan to view only the actions of the informant, no constitutional infirmity exists because the validity of the arrest was not bootstrapped by an unlawful search of the suspect. "The Fourth Amendment protects people, not places." *Katz* v. *United States,* 389 U.S. 347 (1967).

The assumption that the police had ample time to procure a warrant must also fail. Although there was not a substantial basis for a warrant to issue initially, the sufficiency of probable cause to arrest did arise at the apartment after the signal was given by DeBruin to the police. The realities of narcotic dealing then dictated that an arrest be pursued immediately. Since narcotics are easily disposed of either by destruction or sale, even late at night, "exigent circumstances" almost invariably exist. (M. Tr. 10, 26) Therefore immediate warrantless arrests based upon probable cause are imperative. *United States* v. *Irby, supra.*

Once it was established that the police lawfully entered the apartment to arrest the defendant then a search incident to that lawful arrest was legal. *Trupiano* v. *United States,* 334 U.S. 699 (1948). "It has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States,* 390 U.S. 234 (1968). The thirty-eight (38) decks of heroin were easily recognizable as contraband since they were in transparent plastic bags on top of the dresser in the defendant's bedroom where he was arrested. (M. Tr. 13, T. Tr. 18)

Finally, Francisco attacks the constitutionality of the statutory presumption relating to possession with intent to distribute. The respondent admits in his answer that this allegation has merit in light of *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S.E. 2d 217 (1972), and suggests that it should be left to the state courts to determine whether the petitioner's case is controlled by *Sharp.* This Court agrees and, provided the Commonwealth on its own initiative, affords the peti-

tioner a hearing within forty-five (45) days on this issue, this matter is dismissed without prejudice However, in light of the fact that Francisco has exhausted his remedies before on this issue, albeit prior to the decision in *Sharp*, leave is given petitioner, should such a hearing not be conducted, to apply to this Court for reinstitution of this action in order to have this Court consider the issue on its merits.

Accordingly, relief is denied on all grounds raised by the petitioner and it is ORDERED that summary judgment be granted in favor of the respondent.

The petitioner is advised that should be desire to appeal, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of this Order. In default of such notice, the Clerk is requested to return the state court records to the Clerk of the Circuit Court of Fairfax County.

The Clerk is further directed to send a copy of this Order to the petitioner, his counsel, the respondent and the Attorney General of Virginia.

/s/ illegible
United States District Judge

Alexandria, Virginia
January 23rd, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

[Caption Omitted in Printing]

MOTION FOR STAY OF PROCEEDINGS

Petitioner respectfully moves the Court, pursuant to 28 U.S.C. §§ 1651, 2251, to stay the proceeding captioned *Francisco* v. *Gathright*, sought to be initiated, in the Circuit Court of Fairfax County by attorney for respondent, Gilbert W. Haith, Assistant Attorney General of the Commonwealth of Virginia, on or about January 24, 1973. The grounds for this motion are set out below.

In October 1972 petitioner filed the instant habeas corpus petition, alleging that his conviction for possession of heroin with intent to distribute in the Circuit Court of Fairfax County was invalid on the grounds that evidence introduced against him should have been suppressed as the fruit of an unconstitutional search and seizure and that the court's instruction that the conviction "may be based solely upon evidence as to the quantity of the [heroin] possessed" was a denial of due process in that the statutory presumption, stated by the instruction, was irrational and arbitrary. On January 23, 1973 this Court granted summary judgment for respondent, ruling against petitioner on the merits of the search and seizure claim, and dismissing without prejudice the instruction claim to be dealt with in state court in light of an intervening decision of the Virginia Supreme Court, *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E. 2d 217 (1972). On January 24, respondent moved the Circuit Court of Fairfax County to commence state habeas corpus proceedings, a copy of the motion is attached hereto as exhibit A. Petitioner has filed a notice of appeal in the instant case, seeking review of the Court's rulings on both issues in the petition.

The All Writs Act, 28 U.S.C. § 1651, provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Further, a "judge of the United States before whom a

habeas corpus proceeding is pending, may, before final judgment or . . . pending appeal, stay any proceeding against the person detained in any State Court . . . for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251. Petitioner urges that there is a reasonable probability of success on the merits of the pending appeal, that he will be irreparably injured should the state court proceedings be allowed to continue, and that respondent will not be injured by a stay. Accordingly it is submitted that a stay of state court proceedings to preserve the status quo is both authorized and appropriate.

Petitioner respectfully submits that this Court erred in declining to reach the merits of the claim relating to the trial court's instruction. In *Roberts* v. *Lavallee*, 389 U.S. 40 (1967), the Supreme Court considered a strikingly similar situation. The state court had refused Roberts' request for a free transcript of the preliminary hearing on the ground that a state statute made no provision for transcripts without cost. Following conviction and exhaustion of appellate relief, Roberts collaterally attacked his conviction in district court. Habeas corpus relief was denied by the district court on the merits. Thereafter, the highest court of the state held that as a matter of constitutional law, indigent defendants are entitled to a free transcript. *See* 389 U.S. at 41. On appeal from the district court's denial of relief, the Court of Appeals, while acknowledging that Roberts had exhausted his state remedies.

> "thought the 'constitutional necessity for federal court intervention' was 'open to doubt' and that 'the question ought to be decided in favor of permitting a state court determination in the first instance.' Accordingly it dismissed the petition for habeas corpus without prejudice to renewal of the questions presented by petitioner after further proceedings in the [state] courts," 389 U.S. at 41-42.

The Supreme Court vacated the decision of the court of appeals noting:

> "Still more state litigation would be both unnecessarily time consuming and otherwise burdensome. This is not a case in which there is any substantial state interest in ruling once again on petitioner's case. We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles." 389 U.S. at 43.

As the court has more recently pointed out, the

> "accomodation of our federal system [merely] give[s] the State an initial 'opportunity to pass upon and correct' alleged violations of prisoners' federal rights. Petitioners are not required to file 'repetitious applications' in the state courts. Nor does the mere possibility of success in additional proceedings bar federal relief." *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971) (citations omitted). *See Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

The Virginia Supreme Court's decision in *Sharp* relied on no intervening change of state or federal law. The state court decisions cited on the point of unconstitutionality of statutory presumptions antedated petitioners state appellate proceedings by at least eight years. The Virginia Supreme Court's quotation from *Leary* v. *United States*, 395 U.S. 6, 36 (1969) was identical to that set out in the petition for writ of error. *Compare Sharp* v. *Commonwealth, supra*, 192 S.E. 2d at 219, with Petition for Writ of Error, *Francisco* v. *Commonwealth*, Va. Sup. Ct., at 24 (Exhibit B). The Commonwealth met this argument on its merits without reliance on a single case. *See* Brief in Opposition to Petition for Writ of Error, *Francisco* v. *Commonwealth*, at 19 (Exhibit C). Further, determination of the issue requires no inquiry beyond the face of the trial record. Thus, under *Roberts* v. *Lavalle, supra*, petitioner is entitled to determination of the issue by a federal court.

Petitioner will be irreparably injured by requiring him to present his constitutional claims piecemeal in both federal and state courts. Petitioner has already been imprisoned for nearly two years. The claim at issue and the search and seizure claim were presented to the Virginia Supreme Court approximately eighteen months ago and were rejected by that court some five months later. It is urged that further delay is unwarranted. Should the state court rule in petitioner's favor on the instruction point, the judgment of conviction will be set aside and the cause remanded for a new trial. *See Sharp* v. *Commonwealth, supra*, 192 S.E. 2d 219. This could raise a question of mootness in peti-

tioner's appeal to the Fourth Circuit on the search and seizure issue in which event petitioner will be forced to again litigate the search and seizure issue in state trial and appellate court, presumably with the same result. The situation will then be identical to that existing prior to the filing of the petition for habeas corpus in the instant case. On the other hand, should the state court rule against petitioner on the instruction issue, petitioner will be required to seek appellate review of that ruling and, if necessary, again present the issue to this Court. Balanced against this injury to petitioner there appears to be no injury to respondent should the stay be granted.

Accordingly petitioner prays that proceedings in the Circuit Court of Fairfax County involving any matter of the instant case be stayed pending resolution of petitioner's appeal in the federal courts.

Respectfully submitted,

/s/ Daniel C. Kaufman
Attorney for Petitioner
6018 Craig Street
Springfield, Virginia 22150

[Certificate of Service Omitted in Printing]

VIRGINIA: EXHIBIT A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FRANK XAVIER FRANCISCO,
PETITIONER,
vs.
J. S. GATHRIGHT, Superintendent, Bland Correctional Farm,
RESPONENT.

MOTION

Now comes the respondent, by counsel, and moves the Court as follows:

1. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that his conviction in this Court on May 28, 1971, for possession of a controlled drug with intent to distribute was invalid. One of the allegations of his petition therein related to the fact that an instruction had been given to the jury relating to the statutory presumption of quantity of possession being the sole ground for a conviction for possession with intent to distribute.

2. In an order entered January 23, 1973, (a copy of which is attached hereto as an exhibit), the United States District Court deferred consideration of that allegation on the grounds that petitioner has not fully exhausted his state court remedies as to that allegation in light of the recent decision of the Virginia Supreme Court in the case of *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972).

3. In said order, the United States District Court instructed the Commonwealth on its own initiative to afford the petitioner a hearing within forty-five days on this issue.

4. Inasmuch as it would appear to be important for the courts of the State of Virginia to determine the merits of that allegation in light of *Sharp* v. *Commonwealth*, respondent feels that necessary proceedings should be in-

stituted in this Court as soon as possible to accomplish that purpose.

WHEREFORE, respondent moves this Court to immediately appoint counsel to represent the petitioner, and instruct said counsel to immediately file on behalf of said petitioner a petition for a writ of habeas corpus in this Court setting forth the allegation referred to above, and further, that a hearing be scheduled before this Court on said allegations within forty-five days from and after January 23, 1973.

J. S. GATHRIGHT, *Superintendent*,
Bland Correctional Farm

By Illegible
Counsel

Gilbert W. Haith
Assistant Attorney General
911 East Broad Street
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

[Exhibits B and C Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FRANK XAVIER FRANCISCO, PETITIONER, v. JOHN S. GATHRIGHT Superintendent of Bland Correctional Farm, RESPONDENT.	CIVIL ACTION NO. 430-72-A-M

ORDER

[Filed Feb. 16, 1973, Clerk, U. S. District Court, Alexandria, Virginia]

Upon consideration of the petitioner's Motion for Stay of Proceedings filed on February 12, 1973, oral argument on said motion is dispensed with and the motion is denied.

/s/ Illegible
United States District Judge

Alexandria, Virginia
February 16th, 1973

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1313

FRANK XAVIER FRANCISCO, APPELLANT,

versus

J. S. GATHRIGHT, Supt.
Bland Correctional Farm, APPELLEE.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Submitted: May 14, 1973 Decided: Aug. 27, 1973

MEMORANDUM DECISION

Frank Xavier Francisco, a Virginia prisoner, seeks a certificate of probable cause to appeal a district court order denying his petition for a writ of habeas corpus.

Francisco was convicted of possession, with intent to distribute, of a controlled drug (heroin) in violation of *Va. Code Ann.* § 54-524.101(a). In his petition for federal habeas corpus relief he alleged that his arrest occurred without probable cause and that the subsequent search exceeded its permissible scope He also contended that the statutory presumption relating to possession with intent to distribute is unconstitutional. The state admitted that Francisco had presented these claims in his petition for a writ of error to the Virginia Supreme Court which denied review and affirmed the conviction by order on December 14, 1971. Subsequently, however, in the case of *Sharp v. Commonwealth*, 213 Va. 269, 192 S. E. 2d 217 (1972), the

Virginia Court held the statutory presumption to be unconstitutional and the state has admitted that Francisco's claim relative to the constitutional issue may now have merit under *Sharp*. However, the state asked that Francisco be required to submit his claim to the state courts since *Sharp* was decided after the State Supreme Court's denial of review in his case.

The district court agreed with the state "that it should be left to the state courts to determine whether the petitioner's case is controlled by *Sharp*." We affirm this holding. If the state does not comply with the mandate of the district court, Francisco can reapply to the district court for relief. We feel, however, that the district court was premature in reaching the merits of Francisco's allegations of illegal arrest and illegal search and seizure. If relief is granted under *Sharp*, the state will have the option of releasing Francisco or retrying him. In either event the possibility exists that this claim for relief will be mooted.

We therefore vacate that portion of the district court opinion denying relief on the claims of illegal arrest and illegal search and seizure, and direct the district court to dismiss these claims without prejudice. Francisco will therefore be free to reassert this claim if it is not mooted by further proceedings on his claim for relief under *Sharp*.

Accordingly, a certificate of probable cause to appeal is granted, the judgment of the district court is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

/s/ Illegible
Chief Judge, Fourth Circuit

/s/ Illegible
United States Circuit Judge

/s/ Illegible
United States Circuit Judge

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1313

FRANK XAVIER FRANCISCO, APPELLANT,

versus

J. S. GATHRIGHT, Supt.
Bland Corectional Farm, APPELLEE.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part, vacated in part, and remanded to the United States District Court for the Eastern District of Virginia, at Alexandria, for further proceedings consistent with this decision. A certificate of probable cause to appeal is granted.

[Filed Aug. 27, 1973, William K. Slate, II *Clerk*]

/s/ William K. Slate II
Clerk

SUPREME COURT OF THE UNITED STATES

No. 73-5768

FRANK XAVIER FRANCISCO,

PETITIONER,

v.

J. S. GATHRIGHT, Superintendent, Bland Correctional Farm

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 4, 1974

☆U.S. Government Printing Office: 1974—535-448/209

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK XAVIER FRANCISCO,

Petitioner

v.

J. S. GATHRIGHT, Superintendent,
Bland Correctional Farm,

Respondent

BRIEF IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

Andrew P. Miller
Attorney General of Virginia

Gilbert W. Haith
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
LAW AND ARGUMENT	6, 11
CONCLUSION	13
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

Cases

Murch v. Mottram, ____ U. S. ____, 34 L.Ed.2d. 194, 93 S.Ct. ____ (1972)	10
Picard v. Connor, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971)	10
Roberts v. LaVallee, 389 U. S. 40, 19 L.Ed.2d 41, 88 S.Ct. 194 (1967)	10
Preisser v. Rodrigues, ____ U. S. ____, 36 L.Ed.2d 439, 93 S.Ct. ____ (1973)	10
Sharp v. Commonwealth, 213 Va. 269 (1972)	3
Tyler v. Swinson, 383 F.2d 611 (8th Cir. 1973)	11
United States ex rel Levy v. McMann, 394 F.2d 402 (2nd Cir. 1968)	11

STATUTES

§ 54-524.101(a), Code of Virginia (1950), as amended	6

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK XAVIER FRANCISCO,

Petitioner

v.

J. S. GATHRIGHT, Superintendent,
Bland Correctional Farm,

Respondent

BRIEF IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

The respondent, J. S. Gathright, Superintendent of Bland Correctional Farm, respectfully submits the following Brief in response to the Petition for a Writ of Certiorari in the above matter. The parties will be referred to herein by their respective positions in the court below, i.e., petitioner and respondent, or by their respective positions in the State trial court, i.e., defendant and Commonwealth. In addition to the material set out as an appendix to the Petition for a Writ of Certiorari, the respondent has attached to this Brief further matters in the nature of an appendix, as exhibits, and reference thereto will be made throughout the Brief herein.

QUESTIONS PRESENTED

1. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings On An Issue Which Had Not Yet Been Fully Decided By The State Courts And On An Issue Upon Which Relief Could Be Obtained In The State Courts?

2. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings By Refusal Of The Court Below To Determine One Of His Two Claims On The Merits While Awaiting Determination On The Other Claim In The State Courts?

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Fairfax County, Virginia, on May 28, 1971, for illegal possession of a controlled drug with intent to distribute, in violation of § 54-524.101(a) of the Code of Virginia (1950), as amended. Following his conviction, the petitioner appealed to the Virginia Supreme Court by way of direct appeal, alleging in his petition for a writ of error a number of grounds including "Whether defendant's warrantless arrest was based on probable cause?"; "Whether probable cause alone is sufficient to authorize a police officer to validly make a forcible entry into a dwelling to arrest a person therein without an arrest warrant?"; "Whether the warrantless, forcible entry of defendant's dwelling to effect his arrest was necessitated by exigent circumstances?"; "Whether the arresting officers exceeded the permissible scope of a search and seizure incident to defendant's arrest?", all of which allegations were argued in his petition for a writ of error under the category of illegally obtained evidence; and including the allegation of "Whether it is proper to instruct the jury that conviction for possession of a controlled drug with intent to distribute may be based solely on evidence as to the quantity of the drug possessed."

In his petition for a writ of certiorari, the petitioner has set forth some of the background facts relating to the allegation of illegal search and seizure and illegal arrest, and the respondent directs the attention of the Court to the opinion of the United States District Court for the Eastern District of Virginia in Frank Xavier Francisco v. J. S. Gathright, Superintendent, Bland Correctional Farm, (C. A. No. 430-72-A-M), which is included in the appendix attached to the petitioner's petition for a writ of certiorari, and which contains a detailed review of the factual circumstances surrounding the allegation of illegal arrest and illegal search and seizure.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Virginia, Alexandria Division, alleging that his conviction in Fairfax County Circuit Court was invalid, and raised in said petition the allegations of (a) illegal arrest and illegal search and seizure and (b) the use of an improper instruction as to the effect of the quantity on the proof of intent. In his responsive pleading thereto, entitled Answer, the respondent admitted that both of petitioner's allegations had been raised in his direct appeal to the Virginia Supreme Court, and therefore petitioner had technically exhausted his State court remedies as to those allegations. Respondent, however, pointed out further that following the denial of petitioner's petition for a writ of error to the Virginia Supreme Court, that same Virginia Supreme Court handed down the decision in Sharp v. Commonwealth, 213 Va. 269 (1972). Respondent stated in his answer that "under the holding in Sharp, it would appear that the granting of Instruction G. in the petitioner's trial constituted reversible error, and petitioner would be entitled to a new trial. Respondent says further, however, that it should be left up to the State courts to determine whether the petitioner's case is controlled by Sharp or whether there are sufficient facts to differentiate or distinguish petitioner's

case from Sharp."

The United States District Court in its opinion of January 23, 1973, denied petitioner relief on his allegation of illegal arrest and illegal search and seizure and withheld the ruling on his second allegation, agreeing with the respondent that it should be left to the State courts to determine whether petitioner's case is controlled by Sharp v. Commonwealth. In addition, the District Court ordered the Commonwealth, although not technically the respondent, on its own initiative to afford the petitioner a plenary hearing on that allegation within forty-five days of the entry of the order, although not citing any authority for such action and although the respondent had some question as to the authority of the District Court to enter such an order.

Nevertheless, the respondent proceeded to comply with the District Court's order and filed a motion in the Circuit Court of Fairfax County, requesting that Court to appoint counsel for the petitioner in order to file a petition for a writ of habeas corpus and to grant the petitioner an immediate hearing on said petition when filed. (See Exhibit A of the Appendix attached hereto). After consultation with counsel for the respondent, Judge Millsap of the Fairfax County Circuit Court, being somewhat unclear of the extent of his authority to grant the petitioner a plenary hearing in a habeas corpus matter, without a petition for a writ of habeas corpus having been filed, instructed the Clerk of his Court to forward the forms for that purpose to the petitioner, notifying counsel for the respondent of this action by a letter dated February 5, 1973. (See Exhibit B, included in the appendix hereto).

No response was received by the Circuit Court of Fairfax County from the petitioner pursuant thereto, and Judge Millsap then informed Judge Bryan of the United States District Court of the failure of the petitioner to file a petition for a writ of habeas corpus, advising Judge Bryan of all that had been done in an effort to bring on the matter before the Circuit Court of Fairfax County, and advising Judge Bryan that it was impossible to grant the petitioner a plenary hearing unless he filed a petition for a writ of habeas corpus. (See Exhibit C, included as a part of the appendix hereto). After further consultation with counsel for the respondent and with Judge Bryan, Judge Millsap upon his own initiative appointed counsel to represent the petitioner and to assist the petitioner in bringing forward the matter by way of petition for a writ of habeas corpus. (See Exhibit B, included as a part of the appendix hereto). Pursuant to that appointment and after further discussion with counsel for the respondent, the counsel appointed to represent the petitioner and Judge Millsap, it was agreed that a hearing would be held in the Circuit Court of Fairfax County, with the petitioner present in person, to determine just what further steps should be taken in this matter.

Prior to the holding of this hearing, the Circuit Court of Fairfax County, Virginia was advised of the fact that petitioner had been represented in the federal habeas corpus proceedings by Daniel C. Kaufman, Esquire, and counsel for the petitioner appointed by the Fairfax County Circuit Court, David E. Feldman, Esquire, contacted Mr. Kaufman and advised him of the pendency of the hearing in Fairfax County Circuit Court.

That hearing was held on July 27, 1973, and both Mr. Feldman and Mr. Kaufman appeared on behalf of the petitioner, Mr. Feldman being relieved of his duty by the Court, and Mr. Kaufman being appointed in his place. A transcript of that hearing was made and is attached hereto as Exhibit E, as a part of the appendix. At that hearing before the Circuit Court of Fairfax County, Virginia, on July 27, 1973, petitioner, through his counsel, specifically refused to proceed to obtain habeas corpus relief in the State courts and specifically refused to cooperate with the State courts in granting petitioner a plenary hearing to determine whether he should be in fact entitled to a new trial on the basis of Sharp v. Commonwealth.

It was during this same period of time that petitioner's appeals to the United States Court of Appeals for the Fourth Circuit from the decision of the United States District Court, Eastern District of Virginia, were pending, and following said hearing in Fairfax County Circuit Court, the decision of the Fourth Circuit from which this petition for a writ of certiorari is sought was rendered.

LAW AND ARGUMENT

1. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings On An Issue Which Had Not Yet Been Fully Decided By The State Courts And On An Issue Upon Which Relief Could Be Obtained In The State Courts?

At the time of petitioner's conviction in the Circuit Court of Fairfax County, Virginia, § 54-524.101(a) of the Code of Virginia (1950), as amended, under which petitioner was convicted, included a provision that a conviction for violation of that

section may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed. That provision was subsequently repealed by the Virginia Legislature. Although petitioner raised the validity of that statutory presumption in his petition for a writ of error to the Virginia Supreme Court, the Virginia Supreme Court did not grant the petition for a writ of error and affirmed petitioner's conviction, without opinion, therefore not stating exactly why this issue was not considered grounds for a reversal. Nevertheless, the Virginia Supreme Court subsequently decided the case of Sharp v. Commonwealth, 213 Va. 269 (1972), specifically holding that the statutory presumption referred to above was unconstitutional. In Sharp v. Commonwealth, the Virginia Supreme Court did not state one way or the other whether the inclusion of such a statutory presumption as an instruction at a trial would automatically be grounds for reversal of a defendant's conviction. In fact, the Virginia Supreme Court has, since the Sharp v. Commonwealth case was decided, refused to grant petitions for writs of error in other cases where a so-called Sharp instruction was given, without stating the reasons for denying such ruling.

For this reason, and for the additional reason that the inclusion of a Sharp instruction might in fact be harmless error, the respondent took the position in its responsive pleading in the United States District Court in the instant case that relief should not be automatically granted to the petitioner on the Sharp issue, but that the Virginia Court should be given the opportunity to determine whether the inclusion of a Sharp instruction in petitioner's trial was in fact grounds for invalidating his conviction and granting him a new trial. Of

course, the United States District Court agreed with this position of the respondent. At this point in time, the petitioner had, and continues to have to this day, an ample and adequate remedy in the Virginia State courts, to have the validity of his conviction determined in light of Sharp v. Commonwealth. Respondent has never, at any time, attempted to stop the petitioner from proceeding in the State courts, and has in fact cooperated fully to allow the petitioner full opportunity to proceed in the State courts.

In addition, the Circuit Court of Fairfax County has literally bent over backwards to allow the petitioner to proceed in the State courts on the issue of Sharp v. Commonwealth and has agreed to grant the petitioner a plenary hearing and a form for determining such issue, even though the petitioner refused to file a petition for a writ of habeas corpus in that court, and even though there might be some question as to the authority of the Circuit Court of Fairfax County to proceed with a habeas corpus proceeding absent the filing of such a petition. Nevertheless, if the Circuit Court of Fairfax County had granted such a plenary hearing without the necessity of filing a petition, respondent would not have objected and would have concurred in holding such plenary hearing and would have concurred in the granting of petitioner's day in court to decide once and for all whether or not his conviction is tainted by the use of a Sharp instruction. Despite all of this, the petitioner has continued to refuse to cooperate with the State courts and has continued to insist that he wants his relief in federal courts, although the respondent is at a loss as to what difference it makes whether relief is granted in the State courts or granted in the federal courts, since in either case the result

is that the Commonwealth will be given the opportunity to retry the petitioner.

Petitioner, in his petition for a writ of certiorari, appears to indicate that the action of the United States District Court, which was affirmed by the United States Court of Appeals for the Fourth Circuit, in requiring the petitioner to go back to the State courts to determine the Sharp issue was one of forcing him to be batted back and forth between two judicial systems and had the result of delaying unnecessarily the granting of his sought after relief. However, as pointed out above, the fact of the matter is that petitioner would have had his sought for relief long ago if he had proceeded in the State courts initially, as he should have done, or at least had agreed to cooperate with the Circuit Court of Fairfax County, Virginia, when that Court offered him the opportunity to proceed. This matter would not be before this Court at this time and would not any longer be a matter of consideration if petitioner had simply brought his proceeding for a petition for a writ of habeas corpus in the courts of Virginia. The respondent is not assuring this Court and has never attempted to assure the petitioner that he in fact would obtain the sought for relief, i.e., the invalidating of his conviction, simply by filing a petition for a writ of habeas corpus in the Virginia State courts. To the contrary, what the respondent is asserting is that if the petitioner has a valid and meritorious claim for relief that the Virginia State courts are ready, willing and able to grant that relief, and that furthermore the determination of whether petitioner has such grounds for relief is a factual question which should be determined in the State courts.

The respondant is not attempting to interpose further delay to the petitioner's right of habeas corpus whatsoever, but it has attempted from the beginning to expedite the granting of habeas corpus proceedings in the Virginia State courts in order to determine the merits of petitioner's allegation. What petitioner has in fact done is attempt to deliberately bypass his available State court remedies, a practice which was deemed improper in Murch v. Mottram, ____ U. S. ____, 34 L.Ed.2d 194, 93 S.Ct. ____ (1972). The difference between petitioner's case and Roberts v. LaVallee, 389 U. S. 40, 19 L.Ed.2d 41, 88 S.Ct. 194 (1967), cited in the petition for a writ of certiorari, is that the petitioner has not really fully exhausted his State court remedies inasmuch as he has not yet presented to the State courts the question of whether his conviction is made infirm by the fact that a Sharp instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of Sharp v. Commonwealth, supra, and therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation in a different context than it had been previously raised in the Virginia Supreme Court. As pointed out in Picard v. Connor, 404 U. S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971), this is sufficient basis for the District Court having sent the matter back to the State court for determination of petitioner's allegation. As in Preisser v. Rodrigues, ____ U. S. ____, 36 L.Ed.2d 439, 93 S.Ct. ____ (1973), there is in the instant case an adequate State remedy and petitioner should not be allowed to seek the intervention of a federal court until he has first sought and been denied relief in the State courts where a State

remedy is available and adequate.

2. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings By Refusal Of The Court Below To Determine One Of His Two Claims On The Merits While Awaiting Determination On The Other Claim In The State Courts?

Although the District Court in the instant case denied and dismissed the petitioner's claims as to the allegation of illegal arrest and illegal search and seizure, in an exhaustive opinion and discussion of those allegations, the Court of Appeals determined that such a decision by the District Court was premature, in light of the probability of petitioner obtaining relief in the State courts on his allegation relating to the Sharp instruction. Petitioner now asserts that the action of the Court of Appeals was improper; however, petitioner does not rest on any constitutional basis, but only on the basis that the action of the United States Court of Appeals for the Fourth Circuit in the instant case is contrary to opinions of the Courts of Appeals of the Eighth Circuit and the Second Circuit.

Respondent has reviewed those opinions cited by the petitioner in his petition for a writ of certiorari, and would submit to the Court that the instant situation is fully distinguishable from both Tyler v. Swinson, 383 F.2d 611 (8th Cir. 1973), and United States ex rel Levy v. McMann, 394 F.2d 402 (2nd Cir. 1968). In both of those cases, the matter on which exhaustion had not been made was not a matter such as to bring about a real possibility that the petitioner's entire conviction would be set aside and ruled invalid, if sent back to the State courts, and therefore resolving and making the proceedings in the federal courts moot. In Tyler v. Swinson, the matter on which exhaustion

had not been made related to only one of four convictions, whereas the federal habeas corpus petition was attacking all four convictions, therefore, even if petitioner was required to exhaust his State remedies as to that one conviction and was successful in the State courts, it would not result in the federal court being deprived of any further necessity to have to decide the matter. In United States ex rel Levy v. McMann, the allegation upon which exhaustion had not been made was specifically determined by the court to be frivolous, and therefore had the court requiring exhaustion of that issue before proceeding to determine the merits of other allegations again would not result in a favorable decision in the State courts which would render the further federal proceedings a nullity.

To the contrary, as pointed out by the Court of Appeals below, in the instant case the granting of habeas corpus relief by the Virginia State courts on the Sharp v. Commonwealth issue would invalidate petitioner's conviction and render further proceedings in the federal courts moot. Although the granting of habeas corpus relief by the State courts would give the Commonwealth the opportunity to retry the petitioner, it's not necessarily certain that such a retrial would be had, or further that petitioner would be convicted upon said retrial. Therefore, there exists the real possibility that no decision would ever have to be made by the federal courts on the issue of illegal search and seizure and illegal arrest, and it was an appropriate act of discretion by the Court of Appeals in choosing to withhold a decision on that issue until after the petitioner had completed his proceedings in the State courts on the issue of Sharp v. Commonwealth.

CONCLUSION

For the reasons set forth above, the respondent submits that the Petition for Writ of Certiorari should be denied and the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

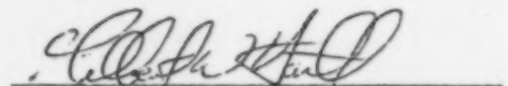
ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 1974, I mailed a copy of the foregoing Brief in Response to Petition for Writ of Certiorari to to Daniel C. Kaufman, Esquire, 1815 H. Street, N.W., Washington, D. C. 20006.



Gilbert W. Haith
Assistant Attorney General

A

VIRGINIA: **ORIGINAL COPY**

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FRANK XAVIER FRANCISCO,

Petitioner,

vs.

J. S. GARRICHT, Superintendent,
Bland Correctional Farm,

Respondent.

MOTION

Now comes the respondent, by counsel, and moves the Court as follows:

1. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that his conviction in this Court on May 28, 1971, for possession of a controlled drug with intent to distribute was invalid. One of the allegations of his petition therein related to the fact that an instruction had been given to the jury relating to the statutory presumption of quantity of possession being the sole ground for a conviction for possession with intent to distribute.

2. In an order entered January 23, 1973, (a copy of which is attached hereto as an exhibit), the United States District Court deferred consideration of that allegation on the grounds that petitioner has not fully exhausted his state court remedies as to that allegation in light of the recent decision of the Virginia Supreme Court in the case of Shaw v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972).

3. In said order, the United States District Court instructed the Commonwealth on its own initiative to afford the petitioner a hearing within forty-five days on this issue.

4. Inasmuch as it would appear to be important for the courts of the State of Virginia to determine the merits of that allegation in light of Shaw v. Commonwealth, respondent feels that necessary proceedings should be instituted in this Court as

Exhibit "A"

soon as possible to accomplish that purpose.

WHEREFORE, respondent moves this Court to immediately appoint counsel to represent the petitioner, and instruct said counsel to immediately file on behalf of said petitioner a petition for a writ of habeas corpus in this Court setting forth the allegation referred to above, and further, that a hearing be scheduled before this Court on said allegations within forty-five days from and after January 23, 1973.

J. S. GARRICHT, Superintendent,
Bland Correctional Farm

By_____
Counsel

Gilbert W. Haith
Assistant Attorney General
911 East Broad Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 1973, a copy of the foregoing Motion was mailed to Frank Xavier Francisco, No. 96916, Bland Correctional Farm, Bland, Virginia, 24315.

Gilbert W. Haith
Assistant Attorney General

F.1.C.

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA

PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

ARTHUR W. SINCLAIR
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JAMES C. CACHERIS
JUDGES

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
February 5, 1973.

Mr. Gilbert W. Haith,
Assistant Attorney General,
Supreme Court Building,
1101 East Broad Street,
Richmond, Virginia. 23219

Re: Francisco v. J. S. Cathright,
Superintendent.

Dear Mr. Haith:

The Clerk of the Court has this date mailed to Mr. Francisco three copies of the forms for petition for writ of habeas corpus to be executed and filed by the petitioner in this court. Mr. Francisco has been advised that upon filing the petition for writ of habeas corpus counsel would be appointed for him and the case scheduled for trial immediately.

The Clerk of the Court will forward to you a copy of the petitioner's writ of habeas corpus when the same has been received.

Very truly yours,

Burch Millsap.

BM:elc

Exhibit "B"

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA

PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

ARTHUR W. SINCLAIR
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JAMES C. CACHERIS
JUDGES

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
June 12, 1973.

Honorable Albert V. Bryan, Jr.,
Judge, United States District Court,
Eastern District of Virginia,
Post Office Building,
Alexandria, Virginia. 22313

Re: Frank Xavier Francisco v. J. S. Cathright;
Your Civil Action 430-72-A-M.

Dear Judge Bryan:

Mr. Gilbert W. Haith, Assistant Attorney General for the Commonwealth of Virginia, in compliance with your order concerning the above-captioned case, filed a motion requesting the appointment of counsel and immediate filing of a petition for a writ of habeas corpus in this court on behalf of Mr. Francisco. Mr. Young, administrative clerk of the court, and at the request of the court, mailed to Mr. Francisco on February 5, 1973, three petitions for writ of habeas corpus. Mr. Young requested expedious filing of the petition and informed Mr. Francisco that an attorney would be appointed to assist him upon filing of the petition.

This court has not received any communication from Mr. Francisco and Mr. Francisco has not filed with the court a petition for writ of habeas corpus, therefore the court feels it cannot comply with your request to afford a hearing to Mr. Francisco within 45 days. The court will immediately give him a hearing upon the filing of a petition with the court for a writ of habeas corpus.

Very truly yours,

Burch Millsap.

BM:elc

cc: Gilbert W. Haith, Esq.

Exhibit "C"

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FRANK XAVIER FRANCISCO,	)
Petitioner	)
VS.	)
J. S. GATHRIGHT, Superintendent Bland Correctional Farm,	)
Respondent.	)

It appearing to the Court that counsel should be appointed in this case to consult with the Petitioner and investigate any matter which the Defendant desires to bring to the Court's attention.

It is therefore, ADJUDGED and ORDERED that David E. Feldman, an able and experienced Attorney at Law, practicing before this Court be appointed to represent the Petitioner to consult, and investigate and assist the Petitioner in filing any petitions which he desires to file.

ENTER: June 19, 1973

Burch Millsap
JUDGE

A COPY TESTE:
W. FRANKLIN GOODING, CLERK
By: [illegible] CLERK
Deputy Clerk

Exhibit "D"

WARD & PAUL
410 First Street, S.E., Washington, D.C. 20003

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)
v.	) Criminal No. 16767
FRANK X. FRANCISCO	)

Fairfax, Virginia

Friday, July 27, 1973.

The above-entitled matter came on for hearing before THE HONORABLE BURCH MILLSAP, Judge of the Circuit Court of the County of Fairfax, in Court Room No. 4 of the Fairfax County Court House, commencing at 10:00 A. M., on Friday, the 27th day of July, 1973.

APPEARANCES:

On behalf of the Commonwealth:

GILBERT W. HAITH, Esq.
Assistant Attorney General

On behalf of the defendant:

DAVID E. FELDMAN, Esq.
and
DANIEL C. KAUFMAN, Esq.

- o - 0 - o -

Exhibit "E"

WARD & PAUL
410 First Street, S.E., Washington, D.C. 20003

P R O C E E D I N G S

(The Court Reporter was first duly sworn.)

THE COURT: Commonwealth of Virginia versus Frank X. Francisco. Are the parties ready? Is Mr. Francisco present? Have a seat at counsel table.

Let the record show that the Commonwealth of Virginia is reprosted by its Assistant Attorney General. The defendant is present in court represented by his attorney, Mr. Feldman.

MR. FELDMAN: For the record, Your Honor, I did get ahold of Mr. Kaufman the other day and I assume this is Mr. Kaufman.

MR. KAUFMAN: Yes.

MR. FELDMAN: He indicated the would like to stay on the case. He did not realize this proceeding was coming up, so if the Court would have no objection, I have no objection to withdrawing from the case.

THE COURT: Mr. Kaufman, did you represent the defendant in the federal proceeding?

MR. KAUFMAN: Yes, I did.

THE COURT: Are you still representing him in federal proceedings?

MR. KAUFMAN: Yes, I am.

THE COURT: The Court would give Mr. Feldman leave to withdraw as counsel for Mr. Francisco and would appoint Mr. Kaufman to represent Mr. Francisco. Have you discussed this with Mr. Francisco to see if there is any objection?

MR. KAUFMAN: Yes, we have and he has no objection.

THE COURT: He is agreeable to your appointment?

MR. KAUFMAN: Yes.

MR. FELDMAN: Thank you, Your Honor.

THE COURT: This matter is coming on somewhat on motion of the Court because of the federal court proceedings wherein the federal court granted the request of the Attorney General that this matter be resolved in a state court rather than on the federal level.

The Court directed the Clerk to mail to the defendant forms for the filing of a petition for a writ of habeas corpus and after a sufficient length of time had expired, the defendant having failed to file the petition for a writ of habeas corpus and after notifying the defendant that counsel would be appointed to represent him upon the filing of the writ, the Court then directed that he be returned to the Fairfax County Jail for the appointment of counsel.

As of this time no motions are pending before the court and the Court would be interested, Mr. Kaufman, in any

WARD & PAUL
Phone (Area 202) 544-6060
410 First Street, S.E., Washington, D.C. 20003

statements you might have to the court if it's your intention to file any motions, not file any motions, if you have been directed by Mr. Francisco to file or not file.

MR. KAUFMAN: I would state as follows, Your Honor. I have discussed this matter fully with Mr. Francisco and it is my advice to him that he not file a state habeas corpus petition and he has agreed with me that it is not in his best interest to so do and he would object to any state habeas corpus proceedings being conducted in this matter.

THE COURT: On the motion for a new trial, he directed you not to file such a motion on his behalf?

MR. KAUFMAN: I have discussed the matter with him fully and he has come to the conclusion it would not be in his best interest to obtain a new trial and for that reason no motion has or will be filed for a new trial on that basis.

THE COURT: Do you have any statements?

MR. HAITH: Yes, sir, Your Honor.

The Commonwealth has, under an order from the Federal District Court, to grant Mr. Francisco a plenary hearing or otherwise a habeas corpus hearing on the state court level on the issue of the Sharp versus Commonwealth case.

It is the Commonwealth's position that the refusal of the defendant to accept state habeas corpus proceedings

WARD & PAUL
Phone (Area 202) 544-6060
410 First Street, S.E., Washington, D.C. 20003

would, in fact, be a voluntary waiver of any right to exhaust his remedies in the state court on that issue and I simply want to make sure for the record that the defendant is fully aware of the fact that this can be construed as a waiver and it will be the Commonwealth's position that it is, in fact, a waiver of his right to have a new trial on the Sharp issue.

THE COURT: The Court is in receipt of a letter from Judge Albert V. Bryan, United States District Court for the Eastern District of Virginia. He stated he did not feel the petition would have to take any initiative. The Court is not clear as to the intention of Judge Bryan in that statement. If, and in the event, the Attorney General was directed to file a petition for a new trial, the motion for the new trial in the court on the Sharp case, would the defendant, Mr. Francisco, cooperate in the case?

MR. KAUFMAN: I have not fully discussed this particular aspect of it but my present feeling is that he would not so cooperate and it's our position that we have fully exhausted all of our state remedies in accordance with the relevant decisions of the United States Supreme Court and to allow the state to obtain a new trial on whatever grounds it chooses would be a violation of Mr. Francisco's right against double jeopardy.

Phone (Area 202) 544-6000
WARD & PAUL
410 First Street, S.E., Washington, D.C. 20003

THE COURT: Does Mr. Francisco wish to take the stand and make any statement for the record?

THE DEFENDANT: No, Your Honor.

THE COURT: Any further statement?

MR. HAITH: Well, Your Honor, in light of the petition of the defendant, there is nothing else the Commonwealth can do. I intend to submit this back to Judge Bryan on the basis that the defendant has intentionally waived his right to state court relief and has intentionally bypassed the state courts in this matter and will never be entitled to a new trial on the grounds of the Sharp issue.

THE COURT: It would be the opinion of the Court that if the defendant in this case directs his counsel not to proceed in any manner in the state court and also upon any action by the Attorney General by way of motion to bring the case before the Court, the Court cannot force upon this defendant any state proceeding if he does not wish to pursue it himself.

The Court, I do not believe, would have the authority to represent the defendant, so, therefore, there is no proceedings in the Commonwealth of Virginia.

The Court will remand the defendant to the custody of the sheriff to await transportation back to Bland Correctional Institute.

MR. HAITH: Thank you, Your Honor.

(Whereupon, at 10:10 A. M., the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF REPORTER

I, William B. Peters, a Certified Verbatin Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter to the best of my knowledge and ability.

William B. Peters
Certified Verbatin Reporter

William B. Peters
Stenographic Reporter
4055 Chain Bridge Road
Fairfax, Virginia
273-2400

Phone (Area 703) 544-6000
WARD & PAUL
410 First Street, S.E., Washington, D.C. 20003

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

RECEIVED
FEB 19
OFFICE OF THE CLERK
SUPREME COURT, U. S.

No. 73-5768

FRANK XAVIER FRANCISCO, Petitioner,

v.

J. S. GATHRIGHT, Superintendent, Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO THE BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 24(4) of the Rules of the Court petitioner Frank X. Francisco submits this Reply to arguments first raised by respondent J. S. Gathright in his Brief in Response to Petition for Writ of Certiorari filed on or about February 6, 1974. The issues raised in Section B of the Petition for Writ of Certiorari (pp. 9-11) appear adequately joined by the papers now on file. Accordingly, this Reply will be confined to the issues raised in Section A of the Petition (pp. 7-9).

Although familiarity with the Petition for Writ of Certiorari will be assumed, petitioner's contentions may be basically summarized as

follows: Petitioner challenged his conviction in state court by way of direct appeal, asserting, among other grounds for reversal, that a jury instruction denied him liberty without due process of law in that it was a presumption without a rational basis. The Virginia Supreme Court rejected this claim without opinion. At about the time petitioner presented the same claim in a federal habeas corpus proceeding, the Virginia Supreme Court in Sharp v. Commonwealth, 213 Va. 269, 192 S.E 2d 217 (1972), found an identical instruction unconstitutional. The district court dismissed the petition for writ of habeas corpus to allow the state courts to rule on petitioner's claim. This decision is "in irreconcileable conflict with Roberts v. LaVallee [389 U.S. 40 (1967)]." Petition at 8.

The nub of respondents argument is as follows:

> "The difference between petitioner's case and Roberts v. LaVallee, 389 U.S. 40, 19 L. Ed. 2d 41, 88 S. Ct. 194 (1967), cited in the petition for a writ of certiorari, is that the petitioner has not really fully exhausted his State court remedies inasmuch as he has not yet presented to the State courts the question of whether his conviction is made infirm by the fact that a Sharp instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of Sharp v. Commonwealth, supra, and therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation in a different context than it had been previously raised in the Virginia Supreme Court. As pointed out in Picard v. Connor, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971), this is sufficient basis for the District Court having sent the matter back to the State court for determination of petitioner's allegation." Respondent's Brief at 10.

This argument is both inconsistent with respondent's position in the courts below and unsupported by authority.

Respondent conceded in paragraph 3 of his answer to the petition for writ of habeas corpus filed in district court that "petitioner has exhausted his State court remedies." The district judge found that "Francisco has exhausted his remedies before on this issue." Opinion at 10, Appendix to Petition for Writ of Certiorari at 13a. Thus respondent seeks to abandon in this Court a position it took below, a position found to be correct by the fact-finder. Apart from respondent's newly adopted legal position, the fact remains that petitioner has exhausted his state remedies by presenting the identical issue on direct appeal. Thus Roberts v. LaVallee is controlling. Roberts unsuccessfully presented a constitutional claim to the highest court of the State; so did petitioner Frank Francisco. That court subsequently recognized, in another individual's appeal, that the earlier asserted claim was meritorious; so did the Virginia Supreme Court in the instant case. This Court rejected the State's argument that the subsequent state decision required that Roberts again present his claim to the state judicial system; This Court should reject respondent's argument that petitioner Frank Francisco must again present his claim to Virginia's judicial system, which had earlier rejected it.

Contrary to respondents assertion, petitioner has presented to the Virginia Supreme Court the question of whether his conviction is constitutionally infirm by reason of a jury instruction which amounted to a denial of due process. The state court's tardy recognition in Sharp of well-established Constitutional principles is respondent's justification for requiring petitioner to again present that claim to the state courts. This position flies in the face of the principle that habeas corpus petitioners are not required to make repetitious applications for relief. Picard v. Conner, 404 U.S. 270 (1971), relied upon by respondent is wholly

inapposite. Petitioner challenged his conviction on direct appeal, contending that a jury instruction deprived him of liberty without due process of law in that it set forth a presumption without rational basis. It was in this context that the Virginia Supreme Court refused, without opinion, to set aside his conviction. It was in this context that the claim was presented to the district court. This contextual identity is strikingly illustrated by comparison of the Sharp opinion with the papers filed in petitioner's direct appeal. In reversing Sharp's conviction on the ground that the instruction given was unconstitutional, the Virginia Supreme Court relied upon and quoted from this Court's decision in Leary v. United States, 395 U.S. 6, 36 (1969). The Petition for Writ of Error filed on petitioner's behalf in the Virginia Supreme Court (a copy of which was in the record provided the district court) had quoted the identical passage from Leary in support of petitioner's contentions on the instruction issue.

Moreover, despite his consistent reliance on Sharp throughout the proceedings in federal court, respondent concedes that "the Virginia Supreme Court has, since the Sharp v. Commonwealth case was decided refused to grant petitions for writs of error in other cases where a so-called ruling." */ Respondent's Brief at 7. Thus there is substance to petitioner's concern that he will "be required to exhaust himself by becoming a ping-pong ball batted back and forth between two judicial systems." Petition at 7.

*/ Respondent refers to the instruction which petitioner has consistently challenged as a "Sharp instruction," and the issue presented in this challenge as a "Sharp issue." However convenient this shorthand notation, petitioner's unwavering position is and has been that the instruction used at his trial was unconstitutional under the principles of Leary v. United States, supra. The fact that the Virginia Supreme Court tardily recognized those principles in Sharp has little bearing on the merits of petitioner's claim.

Respondent's further reliance on the deliberate bypass of state remedies doctrine is misplaced. That doctrine bars collateral attack on a conviction where a constitutional claim was deliberately withheld by the defendant in the original criminal case. The state court proceedings referred to by respondent in pages 4-6 of his Brief and in Exhibits A-E thereto occurred subsequent to the criminal case. Moreover, these proceedings occurred subsequent to the district court's decision in the habeas corpus proceedings and are no part of the record before this Court.

For the foregoing reasons and those set forth for the Petition for Writ of Certiorari it is urged that the writ should be granted.

Respectfully submitted,

Daniel C. Kaufman
1815 H Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Supreme Court, U. S.
FILED
MAY 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5768

FRANK XAVIER FRANCISCO,

Petitioner,

v.

J.S. GATHRIGHT, Superintendent,
Bland Correctional Farm,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

DANIEL C. KAUFMAN
Arent, Fox, Kintner, Plotkin
& Kahn
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

May 1974

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *ii*

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS 2

STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT:

I. The Exhaustion of State Remedies Doctrine Emerged and Developed as a Judicial Accommodation Between the Interests of Federalism and the Need to Preserve the Efficacy of the Writ of Habeas Corpus. It Requires That State Courts be Given an Initial Opportunity to Pass Upon and Correct Violations of Constitutional Rights Before the Federal Courts Inquire Into the Matter 9

II. Where an Issue Raised in a Federal Habeas Corpus Petition Has Been Fairly Presented to the State Courts, State Remedies on That Issue Have Been Exhausted. Absent Intervening Changes in Federal Law Which Cast the Issue in a Fundamentally Different Light, Repetitious Applications to State Courts Are Not Required 15

III. The Fundamental Importance of the Writ of Habeas Corpus as a Swift and Imperative Remedy Mandates Rejection of a Derivative Exhaustion Doctrine Under Which Fully Exhausted Claims in a Federal Habeas

Page

Corpus Petition Are Dismissed Solely Because the Petition Also Includes Distinct and Independent Unexhausted Claims. Neither Considerations of Comity Nor of Convenience Warrant Delay in Federal Court Evaluation of Constitutional Claims Which Have Been Already Reviewed in the State Judicial Process 22

CONCLUSION 31

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Anderson v. Johnson, 371 F.2d 84 (6th Cir. 1966). 23

Barker v. Wingo, 407 U.S. 514 (1973) 27

Blair v. California, 340 F.2d 741 (9th Cir. 1965) 23, 24, 27

Braden v. Judicial Circuit Court, 410 U.S. 484 (1973) 22, 27

Brown v. Allen, 344 U.S. 443 (1953) 14, 17

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 29

Darr v. Burford, 339 U.S. 200 (1950) 12

Ex parte Fonda, 117 U.S. 516 (1886) 7, 12

Ex parte Hawk, 321 U.S. 114 (1944) 12

Ex parte Royall, 117 U.S. 241 (1886) 7, 10, 11, 12, 13, 21

Fay v. Noia, 372 U.S. 391 (1963) 7, 12, 13, 14, 17, 27

Harris v. Estelle, 487 F.2d 1293 (5th Cir. 1974) 25, 27

Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) 19, 28

Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) 26

Johnson v. Wainright, 453 F.2d 385 (5th Cir. 1971) 24

Leary v. United States, 395 U.S. 6 (1969) 17, 21

Page

Lee v. Wiman, 280 F.2d 257 (5th Cir. 1960) 24

Madley v. Kern, 488 F.2d 865 (5th Cir. 1974) 24

McClain, v. Swenson, 435 F.2d 327 (8th Cir. 1970) 23

Mooney v. Holohan, 294 U.S. 103 (1935) 12

Pacheco v. Carberry, 389 F.2d 93 (9th Cir. 1968) 23

Peyton v. Rowe, 391 U.S. 54 (1968) 8, 18, 27, 28

Picard v. Connor, 404 U.S. 270 (1971) 8, 14, 17, 20

Roberts v. LaVallee, 389 U.S. 40 (1967) 8, 16, 17, 18, 30

Sharp v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972) 15, 16, 21

Singleton v. Estelle, 492 F.2d 671 (5th Cir. 1974) 25

Smith v. Peyton, 408 F.2d 1009 (4th Cir. 1968) 28

Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948) 19

Stonebreaker v. Smyth, 163 F.2d 498 (4th Cir. 1947) 19

Tot v. United States, 319 U.S. 463 (1943) 21

Townsend v. Sain, 372 U.S. 293 (1963) 29

Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973) 9, 26

United States v. Romano, 382 U.S. 136 (1965) 21

United States *ex rel* Annunziato v. Deegan, 440 F.2d 304 (2d Cir. 1971) 26

United States *ex rel* Boyance v. Myers, 372 F.2d 111 (3d Cir. 1967) 25, 26

United States *ex rel* DeFlumer v. Mancusi, 380 F.2d 1018 (2d Cir. 1967) 24

United States *ex rel* Levy v. McMann, 394 F.2d 402 (2d Cir. 1968) 9, 26

United States *ex rel* Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972) 26

United States *ex rel* Sniffen v. LaFollette, 393 F.2d (2d Cir. 1968) 25

Page

Wheeler v. Beto, 407 F.2d 816 (5th Cir. 1969) 24, 25
Wilwording v. Swenson, 404 U.S. 249 (1971) 17
Wood v. Brush, 140 U.S. 278 (1891) 12

Statutes and Rules:

28 U.S.C. §1257 12
28 U.S.C. §2254 ..... 7, 9, 10, 23
Rev. Stat. of 1874, §709 12
Act of Sept. 16, 1916, ch. 448, §2, 39 stat 726 12
Va. Code Ann. §8-605 (1957 Repl. Vol.) 19
Rule 19, Supreme Court Rules 13

Miscellaneous:

F.M. Vinson, *Work of the Federal Courts*, 69 S. Ct. v (1949) 13
S. Rep. No. 1559, 89th Cong., 2d Sess. 9 (1948) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5768

FRANK XAVIER FRANCISCO,

Petitioner,

v.

J.S. GATHRIGHT, Superintendent,
Bland Correctional Farm,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the Court of Appeals (App. 50-51) is not officially reported. The order of the United States District Court for the Eastern District of Virginia, at Alexandria (App. 36-42) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1973 (App. 52). The petition was filed November 17, 1973, and was granted March 4, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a person in custody pursuant to the judgment of a State court who had presented a claim to the State courts in the course of the direct criminal proceedings, is to be denied federal habeas corpus relief on the same claim merely because the State Supreme Court has rendered a subsequent decision in another case which confirms that his claim is meritorious.

2. Whether a person in custody pursuant to the judgment of a State court who claims that such custody is, in two independent respects, in violation of the Constitution of the United States, must await federal habeas corpus relief on one ground merely because the other ground should have been presented to the State courts.

CONSTITUTIONAL PROVISIONS

Petitioner's claims for federal habeas corpus relief asserted in the courts below arose under the following Constitutional provisions:

Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Amendment XIV, Section 1

> ". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

Petitioner was prosecuted under Section 54-524. 101(a) of the 1950 Code of Virginia, as amended, which, prior to its repeal in 1972, provided as follows:

> "**§54-524. 101. Unlawful acts; penalties.**—(a) Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:
>
> "(1) To distribute, or possess with intent to distribute a controlled drug.
>
> "(2) To manufacture a controlled drug.
>
> "A conviction for a violation of this §54-524. 101(a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

Petitioner sought federal habeas corpus relief under 28 U.S.C. §§2241, *et seq.* These statutory provisions are somewhat lengthy and are set forth in Appendix A hereto.

STATEMENT OF THE CASE

This case involves important procedural questions concerning the rights of persons held in custody pursuant to a judgment of a State court to a speedy and efficient adjudication of the lawfulness of such custody under the Constitution of the United States.

Petitioner's claims have not been adjudicated on the merits by the court of appeals, nor is this Court called upon to do so. Hence, a brief sketch of his substantive claims and their underlying facts will suffice for an understanding of the procedural issues involved.

Petitioner Frank Xavier Francisco was arrested in the bedroom of his apartment, following the warrantless, forcible entry by Investigator William Luzi and other officers of the Fairfax County, Virginia, Police Department, shortly after midnight on February 18, 1971. (App. 30, 37) At that time a quantity of heroin was seized from his person and from atop a dresser in the room. (App. 30, 37) Another individual present in the apartment was released without charges placed against him. (App. 30) Petitioner was immediately taken before a Justice of the Peace for an initial appearance and held in the Fairfax County Jail in lieu of money bond. (App. 31) Petitioner's arrest was predicated on an informer's tip and Luzi's observations through the curtained window in the living room of petitioner's apartment. The informant, Robert DeBruin, who then had narcotics charges pending against him, had several hours earlier communicated to Luzi that petitioner had purchased heroin and was "cutting it up" for distribution. (App. 30, 36) Pursuant to plan, DeBruin entered petitioner's apartment with marked money, purportedly to purchase drugs, at about half-past midnight. (App. 30, 37) DeBruin had been instructed by the police to pay petitioner for the drugs in front of the window if he observed the narcotics on the premises. (App. 30, 37) When Luzi observed DeBruin hand the money to petitioner he knocked on the apartment door and upon an occupant's refusal to admit him, forced the door open. (App. 30, 37) Unknown to the officers, DeBruin had not observed any drugs in the apartment, but had paid petitioner to

settle a debt. (App. 30, 37) Nothing passed from petitioner to DeBruin. (App. 37)

Petitioner was charged with the unlawful possession with intent to distribute a controlled drug, heroin, and was incarcerated prior to trial by reason of his inability to make bond. (App. 26) Prior to trial, petitioner moved to suppress the narcotics seized on the grounds that his arrest was not supported by probable cause and that the officer's failure to secure a warrant was not excused by exigent circumstances. (App. 15) One week before the scheduled trial date of May 28, 1971, a hearing was held on the motion to suppress. (App. 16) The motion was taken under advisement and, on the morning of trial, denied. (App. 16, 17)

At trial, the Commonwealth's witnesses were Luzi, DeBruin and a chemist. (App. 27) Luzi testified as to the events immediately surrounding the arrest and seizure; the chemist identified the material seized as heroin. (App. 27) DeBruin testified that petitioner had agreed to sell heroin to him that evening and had sold heroin to him on one previous occasion. (App. 27) The defense presented evidence that both petitioner and DeBruin were addicted to heroin, and that DeBruin's reputation in the community for truth and veracity was poor. Petitioner did not testify in his own behalf. (App. 27) In the course of its charge to the jury, the court instructed them, over defense counsel's objection, of the statutory presumption that "a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug possessed." (App. 19) The jury returned a verdict of guilty on the offense charged, sentencing petitioner to eight years' imprisonment at hard labor. (App. 21)

Petitioner sought appellate review of his conviction by petitioning the Supreme Court of Virginia for writ

of error and supersedeas. (App. 25) Among the grounds for appeal were (1) that he was arrested and the drugs were seized in violation of the Fourth Amendment in that the warrantless, forcible entry into petitioner's dwelling to effect his arrest was not based on probable cause or required by exigent circumstances and (2) that the above quoted instruction was based on a presumption without rational basis, thereby denying petitioner due process. (App. 28-29) In a per curiam order dated December 14, 1971, the Supreme Court of Virginia declined to review petitioner's conviction. (App. 35)

In October 1972, petitioner commenced this habeas corpus proceeding in the United States District Court for the Eastern District of Virginia, at Alexandria, filing his petition on the form prescribed by the Court. (App. 2-10) As grounds for the relief sought, petitioner presented to the state courts. (App. 4-8) The Commonwealth was ordered by the district court to show cause why the writ should not be granted. In its answer filed November 11, 1972, the Commonwealth admitted that petitioner had exhausted his state remedies on both claims. (App. 11) It contended, however, that petitioner should again present to the state courts the question of the constitutionality of the challenged instruction. (App. 12) This contention was predicated on the decision of the Supreme Court of Virginia handed down some one month earlier, *Sharp v. Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972), invalidating the instruction on state and federal constitutional grounds. (App. 12) The district court *sua sponte* entered summary judgment against petitioner, ruling against him on the merits of the Fourth Amendment claim and declining to reach the merits of the challenge to the instruction. (App. 36-42) Petitioner noted his appeal from this decision and a certificate of

probable cause was granted by the district court.

On January 24, 1973, the Commonwealth sought to initiate state habeas corpus proceedings in the Circuit Court of Fairfax County. (App. 47-48) Petitioner moved in United States District Court to stay these proceedings on the ground that the precise issue of whether petitioner should be remitted to the courts of Virginia for collateral attack on his conviction was the subject matter of an appeal. (App. 43-46) The district court denied the motion without a hearing. (App. 49)

The United States Court of Appeals for the Fourth Circuit under Rule 7 of its local rules, considered the case without briefs or oral argument. On August 27, 1973 it issued a memorandum decision affirming that part of the district court's order which relegated the instruction claim to the State courts. (App. 50-51) Moreover, the court of appeals vacated the district courts resolution of the merits of petitioner's Fourth Amendment claim on the ground that subsequent state proceedings could possibly moot that claim for relief. (App. 51).

SUMMARY OF ARGUMENT

The exhaustion of state remedies doctrine originated and developed under principles of federalism as a guide to the federal courts' discretion in the exercise of their habeas corpus jurisdiction. Federal courts were to stay their hands until the asserted claim of Constitutional magnitude which had run their full course. *See Ex parte Royall*, 117 U.S. 241 (1866); *Ex parte Fonda*, 117 U.S. 516 (1886); 28 U.S.C. §2254. Once the State courts had been given an initial opportunity to pass upon and correct alleged violations of its prisioners' federal rights, the interests of comity were satisfied and the federal courts should act. *See Fay v. Noia*, 372 U.S. 391 (1963).

The exhaustion doctrine does not require that repetitious applications for relief predicated on the same ground be made to state courts to pursue successive or alternative remedies. *See Picard v. Connor*, 404 U.S. 270 (1971). Absent an intervening change in federal law which casts the legal issues in a fundamentally different light, once fairly presented to the state courts, a federal claim is ripe for adjudication in federal court. *See id.* Petitioner had fairly presented to the state judicial system in the course of the original criminal proceedings his claim that a jury instruction given at his trial stated a presumption without a rational basis, hence a denial of due process. The Virginia Supreme Court's subsequent decision sustaining the identical claim in an unrelated case is no authority to demand that petitioner tread the alternative path of collateral attack in state court. *See Roberts v. LaValle*, 389 U.S. 40 (1967). The possibility of successful application to the state is an insufficient foundation upon which to erect a needless procedural hurdle to the prompt resolution of this claim in federal court. *See id.* Petitioner has exhausted his state remedies. He should not be required to exhaust himself by becoming a ping pong ball batted back and forth between two judicial systems.

The principal aim of the writ of habeas corpus is to provide for the swift judicial review of asserted unlawful restraints. *See Peyton v. Rowe*, 391 U.S. 54 (1968). The derivative exhaustion doctrine applied by the court of appeals under which an exhausted claim is to be dismissed solely because it shares a habeas corpus petition with a distinct and independent unexhausted claim interferes with this objective. Such interference is wholly unjustified by the considerations of federalism under which the exhaustion doctrine developed. The considerations of judicial economy offered in support

of the derivative exhaustion concept are inappropriate for the formulation of a policy at odds with the fundamental values protected by the writ of habeas corpus. A prisoner's fundamental right to be free from unlawful restraint should not be sacrificed on the procedural altar of judicial convenience. *See Tyler v. Swenson*, 483 F.2d 611 (8th Cir. 1973); *United States ex rel Levy v. McMann*, 394 F.2d 402 (2d Cir. 1968). Petitioner had already presented to the state courts the claim that evidence introduced against him at trial was derived from an unlawful search and seizure. Federal adjudication of that claim must not be withheld merely because a distinct and independent claim could be asserted in a state collateral attack on his conviction.

ARGUMENT

I.

THE EXHAUSTION OF STATE REMEDIES DOCTRINE EMERGED AND DEVELOPED AS A JUDICIAL ACCOMMODATION BETWEEN THE INTERESTS OF FEDERALISM AND THE NEED TO PRESERVE THE EFFICACY OF THE WRIT OF HABEAS CORPUS. IT REQUIRES THAT STATE COURTS BE GIVEN AN INITIAL OPPORTUNITY TO PASS UPON AND CORRECT VIOLATIONS OF CONSTITUTIONAL RIGHTS BEFORE THE FEDERAL COURTS INQUIRE INTO THE MATTER.

The instant case concerns the application of the "exhaustion of state remedies" doctrine, now codified[1] in 28 U.S.C. §§2254(b), (c), which requires petitioners for writs of habeas corpus in federal courts to have first pursued their remedies in the courts of the State in

---

[1] No substantive change was intended in the codification. *See* S. Rep. No. 1559, 89th Cong., 2d Sess. 9.

which they were convicted. Sections 2254(b), (c) provided:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedures, the question presented."

The source of the exhaustion doctrine is *Ex parte Royall*, 117 U.S. 241 (1886) which involved a petition for writ of habeas corpus filed prior to trial.

Royall contended that the statute under which he was being prosecuted was unconstitutional, hence the indictments under which he was being held were void. *See id.* at 244. This Court first disposed of the lower court's dismissal on jurisdictional grounds, holding that the federal courts had "jurisdiction upon writ of *habeas corpus*, to inquire into the cause of [Royall's] commitment, and to discharge him, if he be held in custody in violation of the Constitution." *Id.* at 250. However, the dismissal was found justified under the principles of comity. The obligation of State courts to enforce and protect Constitutional rights, which the Court had held to be an inappropriate basis on which to oust the federal courts of jurisdiction, was found to be sufficient reason to allow the state trial to proceed without federal intervention.

> "The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen it is competent for the state court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of habeas corpus, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court. We are of opinion that while the circuit court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Id.* at 250-51.

Federal courts were not at liberty to presume that the decision of the State court when Royall's case was

determined at trial would be otherwise than that required by the Constitution. *See id.* at 252.

Subsequent to *Royall*, it was made clear that State proceedings should normally run their full course prior to federal court intervention by habeas corpus. Accordingly, in *Ex parte Fonda*, 117 U.S. 516 (1886), the principles of *Royall* were held to require federal courts to defer consideration of habeas corpus petitions during the pendency of direct appellate review of the conviction. Subsequently, it was determined that direct appellate review included proceeding to this Court by writ of error.[2] *See Wood v. Brush*, 140 U.S. 278, 290 (1891). The exhaustion doctrine was further refined to require that state collateral remedies be pursued with respect to contentions not reviewed on direct appeal, *see Mooney v. Holohan*, 294 U.S. 103 (1935), and that review be sought in this Court as part of the state collateral remedy, *see Darr v. Burford*, 339 U.S. 200 (1950).

Fay v. Noia, 372 U.S. 391, 435-38 (1963) abrogated the requirement that the state remedies which must be exhausted prior to consideration of a petition for writ of habeas corpus include review here by writ of certiorari. The petition for writ of certiorari was recognized an "unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes." *See id.* at 437. Not only was this Court's docket burdened by petitions for writs of certiorari which did not meet the stringent criteria of

[2] Prior to 1916, review on constitutional grounds of state criminal cases was available in this Court as of right. *See* Rev. Stat. of 1874, §709. When review by writ of error was replaced by the discretionary certiorari procedure, *see* Act of September 16, 1916, Ch. 448, §2, 39 Stat. 726-27. *now codified*, 28 U.S.C. §1257, the requirement that direct review be sought in this Court nonetheless apparently survived. *See Ex parte Hawk*, 321 U.S. 114, 116-17 (1944) (dictum).

Rule 19,[3] but the underlying rationale of comity was adequately served in other ways. *See id.* at 437-38. The discretionary certiorari jurisdiction exists, in the words of Mr. Chief Justice Vinson "to decide only those cases which present questions whose resolution will have immediate importance beyond the particular facts and parties involved," *see* F.M. Vinson, *Work of the Federal Courts*, 69 S. Ct. v, vi (1949). Accordingly, a person whose conviction was sustained by the highest state appellate court squanders judicial resources and merely delays presentation and resolution of meritorious claims in federal district court by petitioning for writ of certiorari to review a decision which is erroneous and obviously of vital importance to him, yet presents no "special and important reasons" for granting review in the sense of Rule 19.

In obviating petitions for writ of certiorari as prerequisites for federal habeas corpus relief, this Court removed "procedural hurdles to the achievement of swift and imperative justice on habeas corpus." *See id.* at 435. Since the consistent underpinning of the exhaustion doctrine from the time of its origins in *Ex parte Royall*, 117 U.S. 241 (1886) was comity, rather than jurisdiction, it followed that the state judicial machinery need only be given "the opportunity to pass upon and correct errors of federal law in the state

[3] "Rule 19, Considerations governing review on certiorari

"1. A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

prisoner's conviction." *See id.* at 438. It had earlier been made clear that comity required no more than giving state courts one such opportunity. Repetitious applications for relief need not be made notwithstanding that state law offered inexhaustible state remedies. *See Brown v. Allen*, 344 U.S. 443, 449 n.3 (1953).

As succintly stated by this Court three terms ago in *Picard v. Connor*, 404 U.S. 270, 275 (1971):

> It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. See *e.g., Nelson v. George*, 399 U.S. 224, 229 (1970); *Irvin v. Dowd*, 359 U.S. 394, 404-405 (1959); *Ex parte Hawk*, 321 U.S. 114 (1944). The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. §§2254(b) and (c), reflects a policy of federal state comity, *Fay v. Noia*, 372 U.S. 391, 419-420 (1963); *Bowen v. Johnston*, 306 U.S. 19, 27 (1939), "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson, ante*, p. 249, at 250. We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950) (overruled in other respects, *Fay v. Noia, supra*, at 435-436). It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. See, *e.g., Wilwording v. Swenson, supra*, at 250; *Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967); *Brown v. Allen*, 344 U.S. 443, 447-450 (1953).

With these principles in mind, we turn to consideration of the instant case. In the habeas corpus petition filed in federal district court, petitioner Frank Francisco collaterally attacked his state court conviction on two distinct grounds – (1) that a jury instruction denied him due process since it constituted a presumption without rational basis and (2) that evidence and testimony offered at his trial were derived from an unconstitutional search and seizure. (App. 4-8) Both of these claims had earlier been asserted (App. 28-29) and rejected (App. 35) in direct appeal to the Virginia Supreme Court. These claims were considered separately below; they warrant and will be given separate treatment here. For convenience, they will be referred to as the "instruction issue" and the "search and seizure issue," respectively.

II.

WHERE AN ISSUE RAISED IN A FEDERAL HABEAS CORPUS PETITION HAS BEEN FAIRLY PRESENTED TO THE STATE COURTS, STATE REMEDIES ON THAT ISSUE HAVE BEEN EXHAUSTED. ABSENT INTERVENING CHANGES IN FEDERAL LAW WHICH CAST THE ISSUE IN A FUNDAMENTALLY DIFFERENT LIGHT, REPETITIOUS APPLICATIONS TO STATE COURTS ARE NOT REQUIRED.

The district court, although declining to reach the merits of the instruction issue, recognized that "Francisco has exhausted his [State] remedies before on this issue." (App. 42) Indeed, this had been conceded by respondent (App. 11). The departure of this case from the norm, however, was occasioned by the Virginia Supreme Court's decision in *Sharp v. Commonwealth*,

213 Va. 269, 192 S.E.2d 217 (1972), which had then been recently handed down. In *Sharp*, the jury instruction which formed one prong of Francisco's collateral attack had been declared unconstitutional on both state and federal grounds. *See* 213 Va. at ___, 192 S.E.2d at 219. The district court agreed with respondent's "suggest[ion] that it should be left to the state courts to determine whether the petitioner's case is controlled by *Sharp*." (App. 41) The courts of appeals affirmed this holding. (App. 51) In so doing, the courts below departed from *Roberts v. LaVallee*, 389 U.S. 40 (1967) and the consistent holdings of this Court that a person seeking federal habeas corpus relief need only have fairly presented his case once to the state courts.

Roberts v. LaVallee, supra, involved virtually the identical procedural situation to that presented in the instant case. The state trial court had rejected Roberts' request for a free transcript of his preliminary hearing. After conviction and exhaustion of direct appellate review, Roberts collaterally attacked his conviction in federal court on the ground that the refusal to provide an indigent defendant with a free transcript was unconstitutional. The district court rejected Roberts' claim on the merits. While his appeal from the decision was pending, the highest court of the state held that, as a matter of federal constitutional law, indigent defendants are entitled to a free transcript of their preliminary hearing. The court of appeals, while acknowledging that Roberts had exhausted his state remedies, "thought the constitutional necessity for federal court intervention was 'open to doubt' and that 'the question ought to be decided in favor of permitting a state court determination in the first instance'." 389 U.S. at 41. Accordingly, as did the district court here, it dismissed the petition without prejudice to renewal following the state court proceedings. This Court vacated the court of appeals decision,

noting that "[s]till more state litigation would be both unnecessarily time consuming and otherwise burdensome." 389 U.S. at 43. As in *Roberts*, there is no substantial state interest in ruling once again on petitioner's instruction claim; there is no reason shown why the Commonwealth wishes to burden its judicial system with an issue which is governed by established federal principles. In deciding *Sharp v. Commonwealth*, the Supreme Court of Virginia relied on no intervening change in federal or state law.[4] The state court decisions cited on the point antedated petitioner's state appellate proceedings by at least eight years. This Court's decision in *Leary v. United States*, 395 U.S. 6 (1969) was relied upon by the Supreme Court of Virginia to invalidate the challenged instruction on federal constitutional grounds; petitioner Francisco had urged upon the Virginia Supreme Court the excerpt of *Leary* which that court later cited as controlling in Sharp.[5] In short, the decisions below are in irreconcilable conflict with *Roberts v. LaVallee, supra*.

Roberts is in accord with the well-established principle that, while comity dictates that state courts are to be given an initial opportunity to pass upon and correct violations of constitutional rights, petitioners are not required to make repetitious applications for relief to state court. *See Wilwording v. Swenson*, 404 U.S. 249, 250 (1971); *Brown v. Allen*, 344 U.S. 443 (1953). This Court has rejected "procedural hurdles to the achievement of swift and imperative justice on habeas corpus" *See Fay v. Noia*, 372 U.S. 391, 435 (1963), and has

[4] As in *Picard v. Conner*, 404 U.S. 270, 276 (1971), this is not "a case in which an intervening change in federal law cast the legal issue in a fundamentally different light," thereby creating an exception to the rule that repetitious applications to state courts are not required.

[5] *Compare* 213 Va. at ___, 192 S.E.2d at 219 *with* App. 31.

recognized that "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty." *See Peyton v. Rowe*, 391 U.S. 54, 63 (1968). Resolution of petitioner's claim has hardly been swift. Nearly three years has now elapsed since petitioner's conviction. By the time this Court hears oral argument some two years will have elapsed since his petition for writ of habeas corpus was filed in district court. The Commonwealth should not be permitted to interpose the further delay incident to state habeas corpus proceedings and any appeals therefrom.

In the Brief in Response to the Petition for Writ of Certiorari, (hereinafter "Brief in Response") at p. 8, respondent glibly asserts that he "is at a loss as to what difference it makes whether relief is granted in the State courts or granted in the federal courts . . . ." However, respondent is not nearly so sure that relief will be granted in state court, warning that he "is not assuring this Court and has never attempted to assure the petitioner that he in fact would obtain the sought for relief." *See id.* at 9. To the contrary, as respondent concedes, even under the less stringent standards of direct appellate review, "the Virginia Supreme Court has, since the *Sharp v. Commonwealth* case was decided, refused to grant petitions for writs of error in other cases where a so-called *Sharp* instruction was given, without stating the reasons for denying such ruling." *Id.* Moreover, *Roberts* was specific in reaffirming the rule that repetitious applications to state courts need not be made, notwithstanding the possibility of success in such efforts. *See* 389 U.S. at 43. More importantly, it is not at all clear that the Virginia courts would entertain a state habeas corpus petition predicated on an issue which had been rejected on direct appeal. In Virginia habeas corpus proceedings, "[a]bsent a change of circumstances, previous determination of the issues by either state or

federal courts will be conclusive." *Hawks v. Cox* 211 Va. 91, 95, 175 S.E.2d 271, 274 (1970). *See* Va. Code Ann. §8-605 (1957 Repl. Vol.). The Virginia courts have not subsequently elucidated the "change of circumstances" which would override the conclusiveness of a prior determination. However, *Hawks*, citing *Stonebreaker v. Smyth*, 187 Va. 250, 46 S.E.2d 406 (1948) indicates that reliance in the petition on a "new constitutional mandate or change in the law" would be an appropriate basis for so doing. *See* 211 Va. at 95, 175 S.E.2d at 274. In *Stonebreaker*, the changed circumstances were a series of decisions by this Court which changed the law and upon which Stonebreaker predicated his claim for collateral relief. *See* 187 Va. at 259, 46 S.E.2d at 412-13. *See also*, *Stonebreaker v. Smyth*, 163 F.2d 498, 501-02 (1947). Whether *Sharp* amount to a "new constitutional mandate or change in the law" under the *Hawks* rule or is merely an application of settled principles appears to be an open question in the Virginia courts.

Respondent has also questioned whether the instruction issue was fairly presented to the Virginia Supreme Court in the Petition for Writ of Error and Supersedeas. The nub of his argument, stated in the Brief in Response, at p. 10, is as follows:

> The difference between petitioner's case and *Roberts v. LaVallee*, 389 U.S. 40, 19 L. Ed.2d, 88 S. Ct. 194 (1967), cited in the petition for a writ of certiorari, is that the petitioner has not really fully exhausted his State court remedies inasmuch as he has not yet presented to the State courts the question of whether his conviction is made infirm by the fact that a *Sharp* instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of *Sharp v.*

Commonwealth, *supra*, and therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation in a different context than it had been previously raised in the Virginia Supreme Court. As pointed out in *Picard v. Connor*, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971), this is sufficient basis for the District Court having sent the matter back to the State court for determination of petitioner's allegation.

Contrary to respondent's assertion, petitioner has presented to the Virginia Supreme Court the question of whether his conviction is Constitutionally infirm by reason of a jury instruction which amounted to a denial of due process. That court's belated recognition in *Sharp* of well-established Constitutional principles is respondent's justification for requiring petitioner to again present that claim to the state courts. This position flies in the face of the principle that habeas corpus petitioners are not required to make repetitious applications for relief. *Picard v. Connor*, 404 U.S. 270 (1971), does not dictate a contrary result. *Picard* makes it clear that a claim raised in federal habeas corpus proceedings must first have been "fairly presented to the state courts." 404 U.S. at 275. Petitioner has no quarrel with the proposition that a claim presented to the state courts in one context may not satisfy the exhaustion doctrine when presented to the federal courts in another. However, in applying that proposition to the instant case, it is manifest that the federal claim has been identically, not merely fairly, presented to the state court in direct appellate review proceedings.

Petitioner challenged his conviction on direct appeal, contending that a jury instruction deprived him of liberty without due process of law in that it set forth a presumption without rational basis. It was in this context that the Virginia Supreme Court refused, without

opinion, to set aside his conviction. It was in this context that the claim was presented to the district court. This contextual identity is strikingly illustrated by comparison of the *Sharp* opinion with the papers filed in petitioner's direct appeal. *See* n.5, *ante*, and accompanying text.

Respondent refers to the jury instruction which petitioner has consistently challenged as a "*Sharp* instruction." *See, e.g.*, Brief in Response at pp. 7-8. This shorthand notation, while suiting respondent's convenience, serves, however, to obscure the petitioner's claims as presented in both the state and federal judicial systems. At no time has petitioner relied upon *Sharp v. Commonwealth* as the basis for relief. The instruction was assailed under the principles set forth in *Leary v. United States*, 395 U.S. 6 (1969), which in turn were derived from *United States v. Romano*, 382 U.S. 136 (1965) and *Tot v. United States*, 319 U.S. 463 (1943). Thus, contrary to the district court's ruling that the question presented was "whether the petitioner's case is controlled by *Sharp*" (App. 41), a question it ordered answered in the first instance by the state courts, the instruction issue raised in the petition for writ of habeas corpus presented the question of whether *Leary*, *supra*, invalidated the instruction given. The state courts had already decided that question in the negative in declining to overturn the conviction in the appellate process. Comity did not require that they be given another opportunity.

Principles of comity were the foundation of the exhaustion doctrine formulated in *Ex parte Royall*, 117 U.S. 241, 250-51 (1886). Federal courts, in the exercise of their jurisdiction to inquire into the causes of custody under State process and to discharge persons held in such custody in violation of the Constitution, were to refrain from intervention into the State criminal proceedings.

The courts of the State were relied upon in the first instance to consider any Constitutional defects asserted. Since these courts were bound by the Supremacy Clause to follow the Constitution, a federal court would not presume in advance of decision that the states courts would default on this obligation. Once the judicial machinery of the state had passed upon the claim, however, petition for redress to the federal courts was appropriate.

The exhaustion doctrine "cannot be used as a blunderbuss to shatter the attempt at litigation of Constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." *Braden v. Judicial Circuit Court*, 410 U.S. 484, 490 (1973). Petitioner has fully satisfied those purposes by presenting the instruction issue on direct appeal. Accordingly, he has exhausted his state remedies on that issue. He should not be additionally required to exhaust himself be becoming a ping-pong ball batted back and forth between two judicial systems.

III.

THE FUNDAMENTAL IMPORTANCE OF THE WRIT OF HABEAS CORPUS AS A SWIFT AND IMPERATIVE REMEDY MANDATES REJECTION OF A DERIVATIVE EXHAUSTION DOCTRINE UNDER WHICH FULLY EXHAUSTED CLAIMS IN A FEDERAL HABEAS CORPUS PETITION ARE DISMISSED SOLELY BECAUSE THE PETITION ALSO INCLUDES DISTINCT AND INDEPENDENT UNEXHAUSTED CLAIMS. NEITHER CONSIDERATIONS OF COMITY NOR OF CONVENIENCE WARRANT DELAY IN FEDERAL COURT EVALUATION OF CONSTITUTIONAL CLAIMS WHICH HAVE BEEN ALREADY BEEN REVIEWED IN THE STATE JUDICIAL PROCESS.

Petitioner predicated the collateral attack of his conviction on the search and seizure issue, as well as the

instruction issue. The district court reached the merits of the search and seizure issue notwithstanding its abstention on the instruction issue. (App. 37-41). However, the court of appeals vacated this action, applying a derivative exhaustion doctrine under which the unexhausted instruction issue barred consideration of the fully exhausted search and seizure issue.[7] (App. 51) Since multiple claims are not infrequent in federal habeas corpus petitions and the circuits have taken inconsistent positions on the proper disposition of such claims, it is appropriate for this Court to decide the question.

The codification of the exhaustion doctrine does not explicity treat the situation in which multiple claims are asserted, referring to "the question presented." *See* 28 U.S.C. §2254(c). In the absence of such statutory guidance, courts of appeals have, without comment on the procedural question, reached the substance of exhausted claims in cases where the district court had correctly dismissed other claims for failure to exhaust state remedies. *See, e.g., McClain v. Swenson*, 435 F.2d 327 (8th Cir. 1970); *Pacheco v. Carberry*, 389 F.2d 93 (9th Cir. 1968); *Anderson v. Johnson*, 371 F.2d 84 (6th Cir. 1966). However, it was recognized that an exhausted claim could be so closely related to the unexhausted claims that federal resolution of the exhausted claims would constitute an unwarranted interference with the state court's resolution of the unexhausted issues. Thus, in *Blair v. California*, 340 F.2d 741, 744-45 (9th Cir.

[7]Part II, *ante*, treats the question of whether the instruction issue was exhausted. Of course, if this Court agrees with petitioner that it was, there is no need to directly pass upon the correctness of a derivative exhaustion doctrine. The instruction issue would then be considered on its merits by the district court, and that court's decision on that issue, and merits of the search and seizure as well, would be subject to review by the court of appeals. Accordingly, in this section of the brief, the instruction claim will be considered, *arguendo*, as unexhausted.

1965), the unexhausted issue was Blair's right to appointed counsel on direct appeal; the exhausted issues were those which he had raised on his *pro-se* appeal. As stated by the court of appeals:

> "These [exhausted] contentions are of a kind which would probably be once more reviewed by the appellate courts of California if it is determined that Blair is entitled to further state appeal proceeding by reason of the denial of his request for counsel on the prior appeal. It would create an impermissible anomaly were we to set machinery in motion which may ultimately afford Blair another state appellate court determination on these issues and then thwart or embarass the state court by purporting to decide those very questions on this appeal." *Id.* at 745 (Footnote omitted). *See also, United States ex. rel DeFlumer v. Mancusi*, 380 F.2d 1018, 1019 (2d Cir. 1967).

However, the instant case involves no such relation between the claims asserted.

Courts of appeals have, when squarely confronted with the exhausted-unexhausted multiple claim situation, reached disparate results. The Fifth Circuit, at least as early as 1960, indicated that the exhausted claim should be disposed of. *See Lee v. Wiman*, 280 F.2d 257, 264. However, less than nine years later, it upheld dismissal *in toto*, of a petition for habeas corpus which included both exhausted and unexhausted claims. *See Wheeler v. Beto*, 407 F.2d 816, 817 (5th Cir. 1969). The court based its ruling on dual considerations of comity and judicial economy. *Wheeler* and its progeny have been consistently relied upon to support similar affirmances by that court in subsequent cases. *See, e.g., Madley v. Kern*, 488 F.2d 865, 866-67 (5th Cir. 1974); *Johnson v. Wainwright*, 453 F.2d 385, 386 (5th Cir. 1971). However, the Fifth Circuit's position has hardly been unwavering; district court adjudications on the merits of exhausted claims

coupled with dismissals of unexhausted claims have been affirmed subsequent to *Wheeler* without consideration of derivative exhaustion doctrine announced in *Wheeler*. *See* cases cited in *Harris v. Estelle*, 487 F.2d 1293, 1297 (5th Cir. 1974). As the *Harris* court commented, the Fifth Circuit cases "are conflicting in result and none reason the basis for their differing disposition." *See id.* The court then reviewed the district court's disposition on the merits of the exhausted claim. *See id.* Similar action was taken in *Singleton v. Estelle*, 492 F.2d 671, 676-77 (5th Cir. 1974), the court noting that the policy against piecemeal litigation "admits of numerous exceptions." The only element of consistency which appears in the Fifth Circuit's line of cases is that the district court's determination as to whether or not to reach the merits of an exhuasted claim was upheld.

Other courts of appeals have taken a more definitive stand on the issue. In *United States ex rel Boyance v. Myers*, 372 F.2d 111 (3rd Cir. 1967), following dismissal of a multiple ground habeas corpus petition *in toto*, Boyance had collaterally attacked his conviction in state court on the unexhausted ground. During the pendency of that proceeding he refiled his federal habeas corpus action alleging only the exhausted claim for relief; the district court again dismissed his petition. *See id.* at 112. The court of appeals reversed, stating that the pendency of the state proceeding did not bar federal adjudication of different claims. *See id. Accord, United States ex rel Sniffen v. LaFollette*, 393 F.2d 726, 727 (2d Cir. 1968), It thus appears that the Third Circuit would require consideration of exhausted claims where distinct unexhausted claims were asserted in district court but not the subject of a pending state proceeding. This, in fact, was the development of the law in the Second Circuit. Relying on *Sniffen, supra*, that court held that assertion of unexhausted claims which were either unrelated to the

exhausted claims or frivolous were not appropriate grounds for dismissal of the entire petition. *See United States ex rel Levy v. McMann*, 394 F.2d 402, 404 (2d Cir. 1968).[8] *Accord, United States ex rel Marcelin v. Mancusi*, 462 F.2d 36, 39 (2d Cir. 1972). *See United States ex rel Annuziato v. Deegan*, 440 F.2d 304, 305 n. 1 (2d Cir. 1971). More recently, the Eighth Circuit held that "in the absence of unusual circumstances, District Courts should be required to consider those claims as to which the petitioner has exhausted his remedies even though he also raises unrelated or frivolous claims in his petition as to which he has not exhausted his remedies." *Tyler v. Swenson*, 483 F.2d 611, 614 (8th Cir. 1973). Those courts which had upheld dismissal *in toto* of multiple claim habeas corpus petitions have done so on bases of comity and of a policy against piecemeal litigation. As the decisions in *Boyance*, *Levy*, and *Tyler, supra*, make clear, comity is an erroneous predicate for such action and considerations of judicial economy must give way to the more important and fundamental interests served by the writ of habeas corpus.

Questions of comity can be disposed of easily. As more fully discussed in Parts I and II, *ante*, the premature intervention by federal courts into the State criminal process is prevented by requiring that the state courts be afforded an initial opportunity to pass upon and correct constitutional violations fairly and presented to them for adjudication. Comity requires no more; it does not demand that repetitious applications for relief be made to the state. By definition, an exhausted claim has been so presented. Hence, the interests of federalism do not demand that they be presented again. Of course, where the exhausted claim is closely related to the unexhausted

[8] The court below had earlier followed *Levy*. See Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969). The decision below represents an implicit rejection of that ruling.

claim, principles of comity would dictate restraint upon federal court action. *See, e.g., Harris v. Estelle*, 487 F.2d 1293, 1297 (5th Cir. 1974); *Blair v. California*, 340 F.2d 741, 745 (9th Cir. 1965). But that is not the case here. Petitioner's search and seizure claim (as to which there has never been a question of a failure to exhaust) is wholly independent and distinct from the instruction issue.

The problem of piecemeal litigation requires more extended analysis. This court has on several occasions comprehensively traced the roots and historical development of the of the writ of habeas corpus. *See, e.g., Fay* v. *Noia*, 372 U.S. 391, 399-426 (1963). That development need not be retraced here. It suffices to note that "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty." *See Peyton v. Rowe*, 391 U.S. 54, 63 (1968). More recently, this Court has spoken in terms of "preserv[ing] the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" *Braden v. Judicial Circuit Court*, 410 U.S. 484, 490 (1973). Judicial economy through avoidance of piecemeal litigation is a laudable goal. However, it should not override the prisioner's interest in obtaining prompt judicial review of exhausted claims by federal courts.

Delay in adjudication of the constitutional issues presented in habeas corpus petitions is more than an abstract detriment to the proper adjudication of the claims raised therein. As this Court recognized in *Peyton v. Rowe, supra*, issues raised in collateral attack frequently require factual determinations predicated on evidence outside the record of the criminal case. *See* 391 U.S. at 62-63. Where the federal adjudication is postponed, the district court's resolution of factual disputes may be flawed. *See id. Cf. Barker v. Wingo*,

407 U.S. 514, 532-33 (1972). Thus, a petitioner's substantive right to be free from unlawful restraint may be needlessly sacrificed by delay on the procedural altar of judicial convenience, and forever lost.[9] Of no less importance is the fact that even if deferral of federal adjudication merely postpones, but does not impair, vindication of constitutional rights, each day that a petitioner is incarcerated under a conviction obtained in violation of his rights will be time that he might properly have enjoyed as a free man. *See Peyton v. Rowe, supra,* 391 U.S. at 64.

The instant case starkly illuminates these issues. There is no reason to believe that petitioner could again raise the search and seizure issue in a state post-conviction proceeding. As noted in Part II, *ante*, the rule of *Hawks v. Cox*, 211 Va. 91, 95, 175 S.E.2d 271, 274 (1970), is that "[a]bsent a change in circumstances, previous determination of the issues by either state or federal courts is conclusive."[10] Petitioner's case appears to present no changed circumstances on the search and seizure issue so as to permit reconsideration by the state court. Thus he can only present that issue in federal court. Moreover, of the two issues presented, the search and seizure issue is singularly inappropriate for postponement. Although the district court disposed of the petition on the basis of the state court record (App. 36), the state court made no specific factual findings in support of its conclusions on probable cause and no factual findings on the question of exigent circumstances. (App. 18). Accordingly an evidentiary

[9] As *Peyton v. Rowe, supra,* recognizes, impairment of the fact-finding process is a two-edged sword. The state may also be aggrieved by an erroneous decision which would not have been rendered had unavailable evidence been presented.

[10] A claim already adjudicated in direct appeal appears to be demurrable in Virginia habeas corpus proceedings. *See* Smith v. Peyton, 408 F.2d 1009, 1010 (4th Cir. 1968).

hearing in district court may well be required. *See Townsend v. Sain*, 372 U.S. 293, 318 (1963). Thus delay carries with it the danger of fading memories and lost evidence. Moreover, petitioner's success in a state post-conviction proceeding on the instruction issue does not prevent the state from retrying him, or, since the challenged instruction went only to the issue of intent, possibly entering a judgment of conviction on the lesser included offense of simple possession and resentencing him on that conviction. On the other hand, if petitioner ultimately prevails on the search and seizure claim, the picture is quite different since substantially all of the Commonwealth's evidence was derived from the challenged search and seizure; as a practical matter retrial would be precluded. Thus, even the asserted interests of judicial economy are not fostered by the court of appeals decision; piecemeal litigation is promoted rather than avoided. If the decisions below are allowed to stand petitioner must present his instruction claim in a state post-conviction action including appeal. Should he not prevail there, ultimate disposition of his constitutional claims would be postponed only for that time. If he succeeds there, there will be the further delay of new criminal proceedings. Moreover, if the "succeeds" in a state collateral attack, he runs the risk of receiving a harsher sentence from a jury on retrial. *See Chaffin v. Stynchcombe* 412 U.S. 17 (1973).

The probabilities are that the federal courts will eventually be required to finally determine the search and seizure issue. There appears no reason why that adjudication should be deferred so as to allow the state to expend judicial efforts which may ultimately be for naught. The court of appeals speculated that "the possibility exists that [the search and seizure] claim for relief will be mooted." (App. 51). The more likely

course of events is, however, that the claim will be presented at a later time. The Commonwealth convicted petitioner before; there is no reason to believe that they cannot, without the challenged jury instruction, convict him of the lesser included offense of simple possession. In so doing, the Commonwealth will again introduce evidence derived from the search and seizure which petitioner has long asserted to have been unlawful. Moreover, "the mere possibility of a successful application to the state courts [is not] sufficient to bar federal relief." *Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967).

The derivative exhaustion doctrine applied by the court of appeals to defer consideration of the fully exhausted search and seizure claim solely because of the distinct and independent unexhausted instruction claim amount to a needless procedural barrier to the prompt vindication of Constitutional rights. At best it amounts to delay; at worst it taints the adjudicatory process. Principles of federalism do not demand such a doctrine, and the rationale of judicial economy is an inappropriate vehicle for interference with fundamental Constitutional rights. Petitioner has once presented the search and seizure claim to the courts of Virginia; those courts are now closed to him on that issue. He is entitled to a prompt federal determination of the claim. If it has merit, he must be freed from confinement. If it is without merit, he should be freed from the anxiety and uncertainty of an unresolved challenge to his incarceration.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the court of appeals directed to determine the merits of Petitioner's search and seizure claim or to remand it to the district court for consideration of the instruction claim and, if that court be so advised, reconsideration of the search and seizure claim.

Respectfully submitted,

DANIEL C. KAUFMAN
Arent, Fox, Kintner,
Plotkin & Kahn
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

APPENDIX

28 U.S.C. §§2241, *et. seq.*

§2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue or order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an

absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the state court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdicition of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provision of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part, of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and

circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duty certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Supreme Court, U. S.
FILED
JUN 24 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 73-5768

FRANK XAVIER FRANCISCO,

Petitioner,

v.

J. S. GATHRIGHT, SUPERINTENDENT
BLAND CORRECTIONAL FARM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

LAW AND ARGUMENT

1. Did The Petitioner, In A Federal Habeas Corpus Proceeding, Fully Exhaust His State Court Remedies Prior to Filing His Federal Petition Where The Petitioner Still Had Available To Him A Means For Relief In The State Court, And Where The Issue Before The Federal District Court Had Not Been Fully Decided In Their Present Context By The Courts Of The State? 7

2. May A Federal Court In A Federal Habeas Corpus Proceeding Withhold A Determination Of One Allegation Of The Petitioner Upon Which Petitioner Has Exhausted His State Court Remedies, And Await The Outcome Of State Court Proceedings On Another Allegation On Which Petitioner Has Not Exhausted His State Court Remedies, In A Situation Where The Outcome Of The Allegation In The State Courts Had The Probability Of Making The Exhausted Allegation A Moot Question Before The Federal Court? 22

CONCLUSION 27

CERTIFICATE OF SERVICE 27

EXHIBITS

TABLE OF CITATIONS

Cases

Anderson v. Johnson, 371 F.2d 84 (6th Cir. 1966) 24

Blair v. California, 340 F.2d 741 (9th Cir. 1965) 23

Page

Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1953) 16

Case v. Nebraska, 381 U.S. 336, 14 L.Ed.2d 422, 85 S.Ct. 1486 (1965) 13

Ex parte Royall, 117 U.S. 241, 29 L.Ed. 868, 6 S.Ct. 734 (1886) .. 10

Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963) 10, 11, 12, 15, 17, 19

Francisco, Frank Xavier v. J. S. Gathright, Superintendent of Bland Correctional Farm (C.A. No. 430-72-A-M) 2

Green v. Beto, 460 F.2d 322 (5th Cir. 1972) 25

Gusik v. Schilder, 340 U.S. 128, 95 L.Ed. 146, 71 S.Ct. 149 (1950) 17

Harrison v. Wainwright, 424 F.2d 633 (5th Cir. 1970) 25

Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965) 13

Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) 25

Humphrey v. Cady, 405 U.S. 500, 31 L.Ed.2d 394, 92 S.Ct. 1048 (1972) 15

Irvin v. Dowd, 359 U.S. 394, 3 L.Ed.2d 900, 79 S.Ct. 825 (1959) 13

Jackson v. Denno, 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774 (1964) 18

Johnson v. Wainwright, 453 F.2d 385 (5th Cir. 1971) 25

Leary v. United States, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1972) 21

Madeley v. Kern, 488 F.2d 865 (5th Cir. 1974) 25

Milton v. Wainwright, 407 U.S. 371, 33 L.Ed.2d 1, 92 S.Ct. 2172 (1972) 17

Page

Mosley v. Smith, 470 F.2d 1320 (5th Cir. 1973) 23

Murch v. Mottram, 409 U.S. 41, 34 L.Ed.2d 194, 93 S.Ct. 71 (1972) 19

O'Neil v. Nelson, 422 F.2d 319 (9th Cir. 1970) 19

Parisi v. Davidson, 405 U.S. 34, 31 L.Ed.2d 17, 92 S.Ct. 815 (1972) 15

Picard v. Connor, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971) 16

Roberts v. LaVallee, 389 U.S. 40, 19 L.Ed.2d 41, 88 S.Ct. 149 (1950) 17, 18

Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973) 15

Sharp v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972) 4, 5, 6, 7, 8, 16, 18, 21, 22

Sigler v. Parker, 396 U.S. 482, 24 L.Ed.2d 762, 90 S.Ct. 667 (1970) 17

Singer v. Meyers, 384 F.2d 279 (3rd Cir. 1967) 18

Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973) 25

United States ex rel Boyance v. Meyers, 372 F.2d 111 (3rd Cir. 1967) 24

United States ex rel DeFlumer v. Mancusi, 380 F.2d 1018 (2nd Cir. 1967) 23

United States ex rel Gockley v. Meyers, 411 F.2d 216 (3rd Cir. 1969) cert. den. 396 U.S. 847, 24 L.Ed.2d 96, 90 S.Ct. 96 18

United States ex rel Irving v. Casscles, 448 F.2d 741 (2nd Cir. 1971) 23

United States ex rel Martin v. McMann, 348 F.2d 896 (2nd Cir. 1965) 23

Page

United States ex rel McBride v. Fay, 370 F.2d 547 (2nd Cir. 1966) 23

United States ex rel Sniffen v. LaFollette, 393 F.2d 726 (2nd Cir. 1968) 24

Wheeler v. Beto, 407 F.2d 816 (5th Cir. 1969) 24

Wilwording v. Swenson, 404 U.S. 249, 30 L.Ed.2d 418, 92 S.Ct. 407 (1971) 16

Statutes

Code of Virginia (1950), as amended, § 54-524.101(a) 3, 4, 7

Title 28 U.S.C. § 2254 .....9, 11,15

Treatise

Note, Development in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038 (1970) 12

In The

Supreme Court of the United States

October Term, 1974

No. 73-5768

FRANK XAVIER FRANCISCO,

Petitioner,

v.

J. S. GATHRIGHT, SUPERINTENDENT BLAND CORRECTIONAL FARM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, J. S. Gathright, Superintendent of Bland Correctional Farm, an employee of the Commonwealth of Virginia, respectfully submits the following brief on the merits on a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The parties will be referred to herein by their respective positions in the court below, *i.e.*, petitioner and respondent.

QUESTIONS PRESENTED

The respondent hereby restates the questions presented in order to more accurately and fully reflect the issues before this Court:

1. Did The Petitioner, In A Federal Habeas Corpus Proceeding, Fully Exhaust His State Court Remedies Prior To Filing His Federal Petition Where The Petitioner Still Had Available To Him A Means For Relief In The State Court, And Where The Issues Before The Federal District Court Had Not Been Fully Decided In Their Present Context By The Courts Of The State?

2. May A Federal Court In A Federal Habeas Corpus Proceeding Withhold A Determination Of One Allegation Of The Petitioner Upon Which Petitioner Had Exhausted His State Court Remedies, And Await The Outcome Of State Court Proceedings On Another Allegation On Which Petitioner Had Not Exhausted His State Court Remedies, In A Situation Where The Outcome Of The Allegation In The State Courts Had The Probability Of Making The Exhausted Allegation A Moot Question Before The Federal Court?

STATEMENT OF THE CASE

In his brief herein, the petitioner has set forth some of the background facts which were developed at his state court trial on the charge of illegal possession of drugs with intent to distribute and which relate to his allegation of illegal search and seizure. The respondent directs the attention of the Court to the opinion of the United States District Court for the Eastern District of Virginia in *Frank Xavier Francisco* v. *J. S. Gathright, Superintendent of Bland Correctional Farm,* (C.A. No. 430-72-A-M), which is included in the appendix to the petitioner's brief (App'x., pp. 36-41), and which contains a detailed review of the factual circumstances surrounding the petitioner's arrest and conviction in the state courts.

Petitioner was convicted in the Circuit Court of Fairfax County, Virginia, on May 28, 1971, for illegal possession of a controlled drug with intent to distribute, in violation of § 54-524.101(a) of the Code of Virginia (1950), as amended. Following his conviction, the petitioner appealed to the Virginia Supreme Court by way of direct appeal, alleging in his petition for a writ of error a number of grounds, including "Whether defendant's warrantless arrest was based on probable cause?"; "Whether probable cause alone is sufficient to authorize a police officer to validly make a forcible entry into a dwelling to arrest a person therein without an arrest warrant?"; "Whether the warrantless, forcible entry of defendant's dwelling to effect his arrest was necessitated by exigent circumstances?"; "Whether the arresting officers exceeded the permissible scope of a search and seizure incident to defendant's arrest?", all of which allegations were argued in his petition for a writ of error to the Virginia Supreme Court under the category of illegally obtained evidence; and including the allegation of "Whether it is proper to instruct the jury that conviction for possession of a controlled drug with intent to distribue may be based solely on evidence as to the quantity of the drug possessed" (App'x., pp. 29-32). His petition for a writ of error was denied and his conviction affirmed, without a written opinion.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Virginia, Alexandria Division, alleging that his convic-

tion in Fairfax County Circuit Court was invalid, and raised in said petition the allegations of (a) illegal arrest and illegal search and seizure and (b) the use of an improper instruction as to the effect of quantity of drugs possessed on the proof of intent. This latter allegation, in particular, was to the effect that petitioner was contending "that the statute under which he was convicted is unconstitutional, (at least as applied to him) as a denial of due process of law in contravention of his rights under the Fourteenth Amendment to the Constitution of the United States, particularly insofar as it provides in Va. Code § 54-524.101(a) that conviction 'may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed.' " (App'x. p. 8).

In his responsive pleading thereto, entitled "Answer," the respondent admitted that both of the petitioner's allegations had been raised in his direct appeal to the Virginia Supreme Court, and therefore petitioner had technically exhausted his state court remedies as to those allegations. Respondent, however, pointed out further that following the denial of petitioner's petition for a writ of error to the Virginia Supreme Court, that same Court handed down the decision in *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972). Respondent stated in his answer that "under the holding in *Sharp*, it would appear that the granting of Instruction G. in the petitioner's trial constituted reversible error, and petitioner would be entitled to a new trial. Respondent says further, however, that it should be left up to the State courts to determine whether the petitioner's case is controlled by *Sharp* or whether there are sufficient facts to differentiate or distinguish petitioner's case from *Sharp*."

The United States District Court in its opinion of January 23, 1973, denied petitioner relief on the merits on his

allegation of illegal arrest and illegal search and seizure and withheld ruling on his second allegation, agreeing with the respondent that it shoud be left to the State courts to determine whether petitioner's case is controlled by *Sharp* v. *Commonwealth, supra*. In addition, the District Court ordered the Commonwealth, although not technically the respondent, to afford the petitioner a plenary hearing on that allegation within forty-five days of the entry of the order, although not citing any authority for such action, and although the respondent has some question as to the authority of the District Court to enter such an order.

Nevertheless, the Commonwealth proceeded to comply with the District Court's order and filed a motion in the Circuit Court of Fairfax County requesting that Court to appoint counsel for the petitioner in order to file a petition for a writ of habeas corpus and to grant the petitioner an immediate hearing on said petition when filed. (App'x. pp. 47, 48). After consultation with counsel for the respondent, Judge Millsap of the Fairfax County Circuit Court, being somewhat unclear of the extent of his authority to grant the petitioner a plenary hearing in a habeas corpus matter without a petition for a writ of habeas corpus having been filed, instructed the clerk of his court to forward the forms for that purpose to the petitioner, notifying counsel for the respondent of this action by letter dated Feburary 5, 1973. (See Exhibit A, attached to this brief).

No response was received by the Circuit Court of Fairfax County from the petitioner pursuant thereto, and Judge Millsap then informed Judge Bryan of the United States District Court of the failure of the petitioner to file a petition for a writ of habeas corpus, advising Judge Bryan of all that had been done in an effort to bring on the matter before the Circuit Court of Fairfax County, and advising Judge Bryan that he felt it was impossible to grant

the petitioner a plenary hearing unless he filed a petition for a writ of habeas corpus. (See Exhibit B. attached to this brief). After further consultation with counsel for the respondent and with Judge Byran, Judge Millsap, upon his own initiative, appointed counsel to represent the petitioner and to assist the petitioner in bringing forward the matter by way of a petition for a writ of habeas corpus. (See Exhibit C. attached to this brief). Pursuant to that appointment, and after further discussion between counsel for the respondent, the counsel appointed to represent the petitioner and Judge Millsap, it was agreed that a hearing would be held in the Circuit Court of Fairfax County, with the petitioner present in person, to determine just what further steps should be taken in this matter.

Prior to the holding of this hearing, the Circuit Court of Fairfax County, Virginia, was advised of the fact that petitioner had been represented in the federal habeas corpus proceedings by Daniel C. Kaufman, Esquire; and counsel for the petitioner appointed by Fairfax County Circuit Court, Daniel E. Feldman, Esquire, contacted Mr. Kaufman and advised him of the pendency of the hearing in Fairfax County Circuit Court. That hearing was held on July 27, 1973, and both Mr. Feldman and Mr. Kaufman appeared on behalf of the petitioner, Mr. Feldman being relieved of his duty by the court and Mr. Kaufman being appointed in his place. A transcript of that hearing was made and is attached hereto as Exhibit D. At that hearing before the Circuit Court of Fairfax County, Virginia, on July 27, 1973, petitioner, through his counsel, specifically refused to proceed to obtain habeas corpus relief in the State courts and specifically refused to cooperate with the State courts in granting petitioner a plenary hearing to determine whether he should in fact be entitled to a new trial on the basis of *Sharp* v. *Commonwealth, supra*, even though Judge Millsap

indicated an apparent willingness to grant petitioner a new trial.

It was during this same period of time that petitioner's appeal to the United States Court of Appeals for the Fourth Circuit from the decision of the United States District Court, Eastern District of Virginia, was pending, and following said hearing in Fairfax County Circuit Court, the decision of the Fourth Circuit was rendered.

LAW AND ARGUMENT

1. Did The Petitioner, In A Federal Habeas Corpus Proceeding, Fully Exhaust His State Court Remedies Prior To Filing His Federal Petition Where The Petitioner Still Had Available To Him A Means For Relief In The State Court, And Where The Issues Before The Federal District Court Had Not Been Fully Decided In Their Present Context By The Courts Of The State?

At the time of petitioner's conviction in the Circuit Court of Fairfax County, Virginia, § 54-524.101(a) of the Code of Virginia (1950), as amended, under which petitioner was convicted, included a provision that a conviction for violation of that section may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed. That provision was subsequently repealed by the Virginia legislature. Although the petitioner raised the validity of that statutory presumption in his petition for a writ of error in his direct appeal to the Virginia Supreme Court, the Virginia Supreme Court did not grant the petition for a writ of error and affirmed the petitioner's conviction, without opinion, therefore not stating exactly why this issue was not considered grounds for a reversal. Nevertheless, the Virginia Supreme Court subsequently decided the case of *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972), specifically holding that the statutory presumption referred to above was unconsti-

tutional. In *Sharp* v. *Commonwealth*, the Virginia Supreme Court did not state one way or the other whether the inclusion of such a statutory presumption as an instruction at a trial would *automatically* be grounds for reversal of a defendant's conviction. In fact, the Virginia Supreme Court, has, since *Sharp* v. *Commonwealth* was decided, refused to grant petitions for writs of error in other cases where a so-called *Sharp* instruction was given, without stating the reasons for denying such ruling.

For this reason, and for the additional reason that the inclusion of the instruction in question might in fact be harmless error, the respondent took the position in his responsive pleading in the United States District Court in the instant case that relief should not be automatically granted to the petitioner on the instruction issue, but that the Virginia courts should be given the opportunity to determine whether the inclusion of such an instruction in petitioner's trial was in fact grounds for invalidating his conviction and granting him a new trial. Of course, the United States District Court agreed with this position of the respondent, as did the United States Court of Appeals for the Fourth Circuit. At this point in time, the petitioner had, and continues to have to this day, an ample and adequate remedy in the Virginia State courts, to have the validity of his conviction determined in light of *Sharp* v. *Commonwealth*. Respondent has never, at any time, attempted to stop the petitioner from proceeding in the State courts, and has in fact cooperated fully to allow the petitioner full opportunity to proceed in the State courts.

In addition, the Circuit Court of Fairfax County, Virginia, has literally bent over backwards to allow the petitioner to proceed in the State courts on this issue and has agreed to grant the petitioner a plenary hearing and a forum for determining such issue, even though the petitioner refused to file a petition for a writ of habeas corpus in that Court, and even though there might be some question as to the authority of the Circuit Court of Fairfax County, Virginia, to proceed with a habeas corpus proceeding absent the filing of such a petition. Nevertheless, if the Circuit Court of Fairfax County had granted such a plenary hearing, without the necessity of filing a petition, respondent would not have objected and would have concurred in holding such plenary hearing and would have concurred in the granting of petitioner's day in court to decide whether or not his conviction is tainted by the use of this instruction. Despite all of this, the petitioner has continued to refuse to cooperate with the State courts and has continued to insist that he wants his relief in federal courts, although the respondent is at a loss as to what difference it makes whether relief is granted in the State courts or granted in the federal courts, since in either case the result is that the Commonwealth would be given the opportunity to retry the petitioner. In fact, if petitioner had cooperated with the Fairfax Circuit Court he might be a free man today.

It is clear that the decision of the United States District Court, and affirmed by the United States Court of Appeals for the Fourth Circuit, was granted on the doctrine of exhaustion of state remedies. This doctrine is granted in Title 28 U.S.C. § 2254 which provides that:

> "a. The Supreme Court, a Justice thereof, a circuit judge, or a district court, shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties by the United States.
>
> "b. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment

of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"c. An applicant shall not be deemed to have exhausted the remedies available of the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In the instant case there is not an absence of available State corrective process and there are no circumstances existing which render such process ineffective to protect the rights of the petitioner. Furthermore the petitioner does have the right under the law of Virginia to raise the question presented, and in fact was given full opportunity to do so by the Circuit Court of Fairfax County, Virginia. Therefore, petitioner's situation falls clearly within the specific language of 28 U.S.C. § 2254.

Petitioner, in his brief, has pointed out that the exhaustion doctrine flows from the decision of this Court in *Ex parte Royall,* 117 U.S. 241, 29 L.Ed. 868, 6 S.Ct. 734 (1886), and that a further comprehensive discussion of the exhaustion doctrine appears in *Fay* v. *Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963). It was pointed out in *Fay* v. *Noia* that in extending the habeas corpus power of the federal courts to what was conceived to be its constitutional limit, the Habeas Corpus Act "clearly enough portended difficult problems concerning the relationship of the State and federal courts in the area of criminal administration." It was further pointed out that even though the federal courts had the power to discharge a State prisoner restrained in violation of the Federal Constitution, ordi-

narily the federal court should stay its hand on habeas corpus pending completion of State court proceedings. "This qualification plainly stemmed from considerations of comity rather than power, and envisaged the postponement, not the relinquishment, of federal habeas corpus jurisdiction, which had attached by reason of the allegedly unconstitutional detention and could not be ousted by what the State court might decide." The rationale of the exhaustion of State remedies doctrine has remained the same, and that is that "it would be unseemly in our dual system of government for a federal district court to upset a State court conviction without an opportunity for the State courts to correct a constitutional violation." This doctrine of comity embraced in the exhaustion requirement is a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers and already cognizant of the litigation have had an opportunity to pass upon the matter. In *Fay* v. *Noia, supra,* this Court specifically held that 28 U.S.C. § 2254 is limited in its application to failure to exhaust State remedies "still open to the habeas applicant at the time he files his application in federal court."

This is precisely the situation that exists in the instant case. Although the Virginia Supreme Court has held the statutory presumption which was the basis of the instruction in the petitioner's trial to be unconstitutional, the Virginia courts have not yet determined whether the use of that unconstitutional statuory presumption in a jury instruction at petitioner's trial was such as to warrant a reversal of his conviction and to grant him a new trial. At the time that petitioner's appeal to the Virginia Supreme Court was effected, that statutory presumption had not yet been found to be unconstitutional. Therefore, the Virginia Supreme Court has not yet ruled upon the question which confronted

the federal district court in the instant case, and it was entirely appropriate as an exercise of the comity doctrine established through the exhaustion of state remedies principle for the federal district court to defer to the State courts to make a definitive ruling on that issue. Just as this Court held in *Fay* v. *Noia*, the district court application of the exhaustion of State remedies was proper because the instant case was a situation where the petitioner had failed to exhaust State remedies which were still open to him at the time he filed his federal habeas corpus petition.

The exhaustion of state remedies doctrine has been further explored in an article in the Harvard Law Review, frequently cited by this Court, (see Note, Developments in the Law—Federal Habeas Corpus, 83 Harv.L. Rev. 1938 (1970)) and in many other decisions of this Court. In said article, the author noted that the federal courts have refused habeas corpus applications from State prisoners until they have first utilized all of their remedies available in the State courts in order to avoid upsetting State court convictions without first allowing the states an opportunity to correct constitutional defects. This rule of exhaustion is rooted in considerations of federal-state comity rather than in the essential nature of the writ of habeas corpus.

> "The significant interest protected by the exhaustion requirement are of two types. First, exhaustion preserves the role of the State courts in the application and enforcement of federal law. Early federal intervention in State criminal proceedings would tend to remove federal questions from the State courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, exhaustion preserves orderly administration of State judicial business, preventing the interruption of State adjudication by federal habeas proceedings. It is important that petitioners reach State appellate courts, which can develop and correct errors of State and federal law and most effectively supervise and impose uniformity on trial courts."

In the instant case, the same reasoning applies. To require petitioner to first seek his relief in the state courts would prevent federal intervention in an appropriately state court matter, that is the determination for the first time of a federal constitutional issue in the state courts. Further, it would preserve the orderly administration by allowing the state courts to develop the state principles to be followed in determining a matter of constitutional magnitude.

In *Irvin* v. *Dowd*, 359 U.S. 394, 3 L.Ed.2d 900, 79 S.Ct. 825 (1959), the Court noted that there is inherent in federal habeas corpus the potentiality of conflict between federal and State courts, and that because of this, this Court developed the doctrine of exhaustion of State remedies and that, except in cases of peculiar urgency, the federal courts ought not to exercise their habeas corpus jurisdiction by a discharge of a state prisoner in advance of a final determination of his case in the courts of the State. In *Henry* v. *Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965), this Court, in remanding a matter back to the State courts for an initial determination, acknowledged that by permitting a State court to make an initial determination of a possible federal question, "we serve the cause of efficient administration of criminal justice, and of harmonious federal-state judicial relations." It was further noted that such a disposition may make unnecessary the processing of the case through the federal courts which were already laboring under congested dockets, or it may make unnecessary the relitigation in a federal forum of certain issue. The same reasoning is certainly applicable in the instant case since the efficient administration of criminal justice could easily be

handled by having the State court set aside the petitioner's conviction, if it is entitled to be set aside, and immediately begin to retry the petitioner rather then by going through the lengthy process of federal habeas corpus proceeding and possible appeals therefrom. Furthermore, such a disposition in the State courts would make unnecessary the processing of the case through the federal courts and would make unnecessary the re-litigation in a federal forum of issues which could easily be decided in the State court. It should be always kept in mind that the State courts attempted to grant petitioner the sought for relief and he specifically refused to cooperate with that court, insisting instead that he would proceed in the federal courts.

By the same token, the following reasoning of Justice Brennan, in his concurring opinion in *Case* v. *Nebraska*, 381 U.S. 336, 14 L.Ed.2d 422, 85 S.Ct. 1486 (1965), is particularly appropriate to the instant case:

> "The desirability of minimizing the necessity for resort by State prisoners to federal habeas corpus is not to be denied. The federal system trusts the States with primary responsibility for the administration of their criminal laws, the Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and State procedures ideally included adequate administration of these guarantees as well. If, by effective corrective processes, the States assumed this burden, the exhaustion requirement of 28 U.S.C. § 2254 (1958 ed.) would clearly promote State primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that non-meritorious claims would be fully ventilated, making easier the task of a federal judge if the State prisoner pursued his cause further. . . . Greater finality would inevitably attach to State court determinations of federal constitutional questions because evidentiary hearings on federal habeas corpus would . . . prove unnecessary."

The action of the federal district court in requiring further exhaustion in the instant case was directly in line with these principles. The State of Virginia was assuming its burden of providing an effective corrective process, and the exhaustion requirement in the instant case clearly promoted the initial determination of a factual as well as legal question of constitutional magnitude, thereby either vindicating without any need for federal court intervention a meritorious claim, or fully ventilating all of the possible arguments on a non-meritorious claim before the petitioner proceeded further with his federal habeas corpus proceeding.

The need for comity, for deference to initial State court determinations, and for an increasing emphasis on the principle of federalism, has consistently been recognized by this Court. See concurring opinion of Justice Douglas in *Parisi* v. *Davidson*, 405 U.S. 34, 50, 31 L.Ed.2d 17, 32, 92 S.Ct. 815 (1972); and see concurring opinion of Justice Powell in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973).

As well as in *Fay* v. *Noia, supra*, this Court also stated in *Humphrey* v. *Cady*, 405 U.S. 504, 31 L.Ed.2d 394, 92 S.Ct. 1048 (1972), that 28 U.S.C. § 2254 requires exhaustion where there are State remedies still open to the habeas corpus petitioner at the time he applies for habeas corpus in the federal courts. This is the exact situation which existed in the instant case. Although the petitioner had presented an issue to the Virginia Supreme Court involving the constitutionality of the statutory presumption, which was made a part of an instruction to the jury at his trial, this question

had not yet been presented to the State court in the light of the decision in *Sharp* v. *Commonwealth, supra,* and in light of the question of whether petitioner's conviction was invalid because that instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of *Sharp* v. *Commonwealth.* Therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation which had to be decided in a different context than when it had previously been raised in the Virginia Supreme Court. The State courts, in the instant case, have not yet been provided with an opportunity to apply controlling legal principles to the facts bearing upon petitioner's constitutional claim. The substance of petitioner's constitutional claim, in its present posture, has not yet been presented to the State courts. *Picard* v. *Connor,* 404 U.S. 270, 30 L.Ed. 2d 438, 92 S.Ct. 509 (1971).

While there is no requirement that petitioner file repetitious applications in the State courts, *Wilwording* v. *Swenson,* 404 U.S. 249, 30 L.Ed.2d 418, 92 S.Ct. 407 (1971); *Brown* v. *Allen,* 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1953), there is still open in the instant case a question of whether petitioner's claim, in its present posture, is so clearly distinct from the claim he presented on direct appeal that it may fairly be said that the State courts have had no opportunity to pass upon the present claim; and if so whether there is presently available a state forum in which he can effectively present the claim. *Humphrey* v. *Cady, supra.* To require exhaustion in the present situation would be nothing more than allowing the State courts the opportunity for a determination of the issue in light of an intervening change in the law, and in light of the uniqueness of the facts of petitioner's case to that change in the law, before requiring the federal courts to exercise habeas corpus relief. See *Sigler* v. *Parker,* 396 U.S. 482, 24 L.Ed.2d 672, 90 S.Ct. 667 (1970); *c.f. Gusik* v. *Schilder,* 340 U.S. 128, 95 L.Ed. 146, 71 S.Ct. 149 (1950). The action of the federal district court in the instant case was an appropriate exercise of the district court's discretion to deny relief to an applicant under certain circumstances. *Fay* v. *Noia,* 372 U.S. 391, 438, 9 L.Ed. 2d 837, 869, 83 S.Ct. 822 (1963).

The respondent submits that the instant case is distinguishable in a number of ways from *Roberts* v. *LaVallee,* 389 U.S. 40, 19 L.Ed.2d 41, 88 S.Ct. 194 (1967), relied upon by the petitioner. In the first place, *Roberts* v. *LaVallee,* involved a question which was purely one of federal law, and did not involve any question of factual determination. In the instant case the question is at least a mixed one of federal law as well as State law. In order to make a proper determination in the instant case it was necessary for the federal district court to apply federal law, to apply State law, and to determine factual issues in order to determine whether the petitioner's conviction was made infirm by the use of the questioned instruction. This was contrary to the situation in *Roberts* where the issue involved was no longer open to question.

Furthermore, in the instant case there was clearly yet to be determined the question of whether the use of the questioned instruction in petitioner's trial was a situation of harmless error. A determination of harmless error can remove from a case a question of federal constitutional error, otherwise cognizable on habeas corpus. *Milton* v. *Wainwright,* 407 U.S. 371, 33 L.Ed.2d 1, 92 S.Ct. 2172 (1972).

In other words, *Roberts* v. *LaVallee, supra,* involved a question which was purely one of federal law, while the instant case the question that would be before either the State court or the federal district court is at the most a

mixed question of State and federal law. This distinction has been recognized, for instance, in *Singer* v. *Meyers,* 384 F.2d 279 (3rd Cir. 1967), which cites both *Jackson* v *Denno,* 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774 (1964), a case which involved an important interest of the State and in which remand to the State was held to be proper, and *Roberts* v. *LaVallee, supra,* where no State issue was involved and no remand was required. See also, *United States ex rel Gockley* v. *Meyers,* 411 F.2d 216 (3rd Cir. 1969), cert.den. 396 U.S. 847, 24 L.Ed.2d 96, 90 S.Ct. 96.

Another distinction between *Roberts* v. *LaVallee in the* instant case is that *Roberts* involved a situation where remand to the State courts for initial determination would be unnecessarily burdensome and time consuming. The petitioner, in his brief, submits that the same reasoning should apply to his case. However, the fact of the matter is that more litigation in the instant case would not have been time consuming and otherwise burdensome, since the federal district court had given the State courts a certain period of time within which to act, and the State courts had in fact attempted to act within that time limit. The only thing that is making the petitioner's case time consuming and burdensome to the federal courts is the petitioner's continued insistence that he obtain his relief in the federal courts and his continued insistence to proceed in the federal courts rather than going ahead and getting the case over once and for all in the State courts, as was attempted herein by the respondent. Furthermore, *Roberts* v. *LaVallee* did not involve any fact-finding of any kind to determine whether he should be entitled to relief or not; however, in the instant case some findings of fact would be necessary to determine whether the petitioner's case is controlled by *Sharp* v. *Commonwealth, supra,* and to determine whether the use of the

unconstitutional instruction in petitioner's case was such as to make his conviction void. It is appropriate that any such findings of fact be done first by the State courts. See *O'Neil* v. *Nelson,* 422 F.2d 319 (9th Cir. 1970).

The petitioner consistently has argued that to require him to exhaust his remedies in the State courts, as was required by the federal district court in the instant case, is to require him to make repetitious applications for relief in the State courts. However, the fact of the situation is that he was not being required to make repetitious applications to the State courts, but was simply being required to make one application to the State court for a determination of the merits of his case. And as can be seen, the State courts attempted to give him that opportuniy. He cannot now come to this Court and complain because of the action of the federal district court, when in fact it was the petitioner himself who prevented the State courts from acting, not the respondent and not the officials of the State. *Fay* v. *Noia, supra,* recognized that habeas corpus has traditionally been regarded as being governed by equitable principles, and that among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Certainly the equitable principle of coming to the court with clean hands is applicable in the instant case where the petitioner has done his best to prevent the State courts from granting him the relief sought and has insisted instead that he be granted habeas corpus relief in the federal courts. While the respondent is not contending that this is a situation of deliberate bypass of the State courts, see *Murch* v. *Mottran,* 409 U.S. 41, 34 L.Ed.2d 194, 93 S.Ct. 71 (1972), the situation is certainly analogous to a situation of deliberate bypass of State courts.

The petitioner, in his brief, appears to indicate that the

action of the United States District Court, which was affirmed by the United States Court of Appeals for the Fourth Circuit, in requiring the petitioner to go back to the State courts to determine the merits of his allegation was one of forcing him to be batted back and forth between two judicial systems and had the result of delaying unnecessarily the granting of his sought after relief. However, as pointed out above, the fact of the matter is that petitioner would have had his sought for relief long ago if he had proceeded in the State courts initially, as he should have done, or at least had agreed to cooperate with the Circuit Court of Fairfax County, Virginia, when that Court offered him the opportunity to proceed. This matter would not be before this Court at this time and would not any longer be a matter of federal court consideration if the petitioner had simply brought his proceeding for a petition for a writ of habeas corpus in the courts of Virginia. If the petitioner had a valid and meritorious claim for relief, the Virginia State courts have always been ready, willing and able to grant that relief, and furthermore the determination of whether petitioner has such grounds for relief is a factual question which should first be determined in the State courts.

The respondent is not attempting to interpose further delay to the petitioner's right of habeas corpus whatsoever, but has attempted from the beginning to expedite the granting of habeas corpus proceedings in the Virginia State courts in order to determine the merits of petitioner's allegation.

One further comment should be made in connection with the assertion in the petitioner's brief herein that the issue he has presented to the federal district court is the identical issue that was presented to the Virginia Supreme Court, and that that issue was not in any way affected by the intervening decision of the Virginia Supreme Court in *Sharp* v.

Commonwealth, supra. For this proposition the petitioner relies upon the fact that in his petition for a writ of error on his direct appeal to the Virginia Supreme Court he relied to some extent upon *Leary* v. *United States,* 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969), and that *Leary* was relied upon by the Supreme Court of Virginia to invalidate the challenged instruction on federal constitutional grounds in *Sharp* v. *Commonwealth.* However, the respondent submits that a close reading of *Sharp* v. *Commonwealth* shows clearly that the Virginia Supreme Court did not rely upon *Leary,* but relied upon preceding opinions of the Virginia Supreme Court, and relied primarily upon the fact that the instruction in question was in violation of the Virginia Constitution. Furthermore, the petitioner, in his petition for a writ of habeas corpus in the federal district court herein, did not cite *Leary* v. *United States* in any way whatsoever to support his relief in the federal district court. Simply because the petitioner has attempted to claim that his issue is the same now as it was on his direct appeal before the Virginia Supreme Court is not conclusive on the question of whether it is in fact the same issue. While it is the same instruction that is in question, it is the applicability of that instruction to the petitioner's trial and the applicability of the validity of that instruction which is a completely different issue in its present posture than it was before the Virginia Supreme Court on petitioner's direct appeal. Accordingly, petitioner has not exhausted his State court remedies on the issue in its present posture, and the federal district court in the instant case was properly following the doctrines and dictates of this Court in the cases referred to above relating to the exhaustion of State remedies in requiring the petitioner to first exhaust his remedies in the State courts. Petitioner was not a "ping pong ball batted back and forth between judicial systems," but was a State court prisoner

who was given the opportunity to have the State courts determine whether his conviction was void, and if so to then proceed to a new trial. Petitioner's appropriate proceeding should have been in the State courts in the first instance and not in the federal district court, and the action of the federal district court in requiring him to go back to the State courts, and the further action of the State courts in giving him every opportunity to challenge his conviction, was an appropriate procedure and should not be reversed by this Court.

2. May A Federal Court In A Federal Habeas Corpus Proceeding Withhold A Determination Of One Allegation Of The Petitioner Upon Which Petitioner Had Exhausted His State Court Remedies, And Await The Outcome Of State Court Proceedings On Another Allegation On Which Petitioner Had Not Exhausted His State Court Remedies, In A Situation Where The Outcome Of The Allegation In The State Courts Had The Probability Of Making The Exhausted Allegation A Moot Question Before The Federal Court?

The United States Court of Appeals for the Fourth Circuit determined that the federal district court was premature in reaching the merits of petitioner's allegations of illegal arrest and illegal search and seizure, as long as petitioner was going to be required to exhaust his remedies in the State courts on the issue of the *Sharp* instruction. In particular, the Fourth Circuit held that "if relief is granted under *Sharp*, the State will have the option of releasing Francisco or retrying him. In either event, the possibility exists that this claim for relief will be mooted." Therefore, the Court of Appeals was relying upon a doctrine that the federal courts should abstain from deciding exhausted habeas corpus allegations when they are joined in a petition which also includes unexhausted allegations, and where the State court determination of those unexhausted claims and

allegations, would have the possible effect of making it unnecessary for the federal courts to have to make any decision on the allegations which have been exhausted. Although this issue appears to never have been directly before this Court, the Court of Appeals opinion was a recognition of the principle that dismissal of both exhausted and unexhausted claims, to await exhaustion, was proper where the claims where closely related or where the State court decision might make federal determination of the claims moot. *United States ex rel Martin* v. *McMann*, 348 F.2d 896 (2nd Cir. 1965); *United States ex rel McBride* v. *Fay*, 370 F.2d 547 (2nd Cir. 1966); *United States ex rel Irving* v. *Casscles*, 448 F.2d 741 (2nd Cir. 1971); *Mosley* v. *Smith*, 470 F.2d 1320 (5th Cir. 1973). In *Blair* v. *California*, 340 F.2d 741 (9th Cir. 1965), discussed by the petitioner in his brief, the Court of Appeals also took cognizance of the fact that the need for them to rule on the exhausted claim might be mooted by the action of the State court on the unexhausted claim. (See 340 F.2d 741, 745 n. 7).

A close reading of *United States ex rel Deflumer* v. *Mancusi*, 380 F.2d 1018 (2nd Cir. 1967), also indicates that the possibility of mootness was great. In *Deflumer*, the unexhausted claim related to voluntariness of the plea of guilty, therefore a favorable ruling in State court meant either discharge of the prisoner or a new trial and an unfavorable State ruling meant that the exhausted claim was waived. In either case the possibility of mootness was substantial. In *Mosley* v. *Smith, supra*, the Court of Appeals said that to defer ruling may avoid piece-meal litigation and may avoid need for the federal courts to act at all, an implicit recognition of the doctrine of deferral in a situation of possible mootness.

To the contrary, those cases where courts of appeals have not disturbed the rulings of the district courts where an ex-

hausted claim was considered, even though when joined with unexhausted claims, have involved situations where there was not the presence of the possibility of mootness, or have involved situations where the procedural problem was not presented to the court of appeals as such. For instance, *Anderson* v. *Johnson,* 371 F.2d 84 (6th Cir. 1966), referred to by the petitioner in his brief, did not involve a situation of possible mootness, since the federal court, while noting that one of petitioner's allegations had not been exhausted, also found that allegation to be totally without merit, and therefore there was no real issue of multiple claims. In *United States ex rel Boyance* v. *Meyers,* 372 F.2d 111 (3rd Cir. 1967), the federal habeas corpus petition did not include the unexhausted claim, therefore distinguishing that case considerably from the instant situation. The only claim pending before the federal court in *Boyance* had been fully exhausted. The same is true of the case of *United States ex rel Sniffen* v. *LaFollette,* 393 F.2d 726 (2nd Cir. 1968), where the unexhausted claim was one on which the petitioner could not obtain federal relief anyway. (See 393 F.2d 726, 727 n.1).

In addition to those circuits which have followed the rule referred to above, where the exhausted claims and the unexhausted claims were closely related, or where there was a possibility of mootness, the Fifth Circuit Court of Appeals appears to have adopted a general rule requiring full exhaustion of all State court remedies before recognition of federal habeas corpus. The leading case dealing directly with this issue is *Wheeler* v. *Beto,* 407 F.2d 816 (5th Cir. 1969), a case where the petitioner had failed to present one of his four federal allegations to the State courts:

> "While it is true that appellant has exhausted his State remedies as to the other issues presented in his petition, considerations of comity dictate against having his case pending in State and federal courts at the same time. Moreover, we believe that considerations of judicial efficiency dictate against piece-meal litigation of petitioner's claims in federal court. . . ."

The Court then proceeded to hold that such dismissal of all of the claims by the district court, without predjudice, was not an abuse of that court's discretion. See accord *Johnson* v. *Wainwright,* 453 F.2d 385 (5th Cir. 1971); *Harrison* v. *Wainwright,* 424 F.2d 633 (5th Cir. 1970); *Green* v. *Beto,* 460 F.2d 322 (5th Cir. 1972); *Madeley* v. *Kern,* 488 F.2d 865 (5th Cir. 1974).

By the same principle referred to above, the case of *Hewett* v. *North Carolina,* 415 F.2d 1316 (4th Cir. 1969), is distinguishable from the instant case because in *Hewett* the Fourth Circuit Court of Appeals was ready to grant relief setting aside convictions which had been fully served, therefore there was no possibility of a retrial of the petitioner, and the federal decision would not be mooted by any pending State proceedings. *Tyler* v. *Swenson,* 483 F.2d 611 (8th Cir. 1973), is also distinguishable because in *Tyler* the federal courts would still have to eventually decide the exhausted issues, no matter what happened in the State courts. The Court of Appeals in *Tyler* further recognized an exception to the rule being applied therein for unusual circumstances. Unusual circumstances has been determined by the Fourth Circuit in the instant case to be a situation where the possibility of mootness is present.

The petitioner argues in his brief that the federal courts should have decided the search and seizure issue, prior to his obtaining a possible retrial in the State courts, because that issue would not again be cognizable in the State courts and the only way that issue could be determined in his favor

is if it was so determined by a federal court. However, this proposition fails to recognize that the practical result of that would be to have a federal court determining an issue of search and seizure in a case where the petitioner could very possibly obtain relief from his pending State court conviction and either be released completely or at the worst, subject to a retrial. Therefore, the situation would be present where the federal courts were determining an issue of search and seizure in merely an advisory capacity. Even if petitioner was retried in the State courts, the question of whether the seized evidence would be admissible in such trial, would not be dependent upon any decision in the federal courts one way or the other, but would be a fresh decision before the trial court. No determination favorable to the petitioner on that issue would be binding on the trial court at petitioner's retrial. In fact it would be entirely possible that the facts relating to whether the search and seizure was valid or not would be substantially different at a potential retrial, what with the passage of time, the loss of possible witnesses, the differences in memory of the individuals involved from such passage of time, etc. Therefore, if the petitioner pursued his State court remedies, as the district required him to do, and obtained a favorable result in the State courts, then the question of the validity of the search and seizure, in the federal courts, would be moot. The Court of Appeals was proper in requiring that that decision be held in abeyance until the outcome of the State court decision on the instruction issue had been determined.

Once again the petitioner seems bound and determined to have his case decided by the federal courts, although it's not necessary for him to do so, and appears to be convinced he is not capable of receiving due process and a fair trial in the State courts.

Respondent submits that the action of the Court of Appeals in this case was entirely proper, since it had the effect of preventing the federal courts from being put in a position of rendering advisory opinions or rendering opinions on matters that were moot.

CONCLUSION

For the foregoing reasons, the respondent submits that the decision below should be affirmed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, the undersigned, certify that three copies of the foregoing Brief were mailed to Daniel C. Kaufman, Arent, Fox, Kintner, Plotkin & Kahn, 1815 H Street, N.W., Washington, D. C. 20006, counsel for the Petitioner, on or before June 21, 1974.

GILBERT W. HAITH
Assistant Attorney General

EXHIBIT "A"

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
Prince William County Fairfax County
Alexandria City

[SEAL]

Arthur W. Sinclair
Barnard F. Jennings
James Keith
William G. Plummer
Lewis D. Morris
Percy Thornton, Jr.
Burch Millsap
James C. Cacheris
Judges

Fairfax County Courthouse,
Fairfax, Virginia 22030,
February 5, 1973.

Mr. Gilbert W. Haith,
Assistant Attorney General,
Supreme Court Building,
1101 East Broad Street,
Richmond, Virginia 23219

Re: Francisco v. J. S. Gathright,
Superintendent.

Dear Mr. Haith:

The Clerk of the Court has this date mailed to Mr. Francisco three copies of the forms for petition for writ of habeas corpus to be executed and filed by the petitioner in this court. Mr. Francisco has been advised that upon filing the petition for writ of habeas corpus counsel would

be appointed for him and the case scheduled for trial immediately.

The Clerk of the Court will forward to you a copy of the petitioner's writ of habeas corpus when the same has been received.

Very truly yours,

/s/ Burch Millsap

BM:elc

EXHIBIT "B"

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
Prince William County Fairfax County
Alexandria City

[SEAL]

Arthur W. Sinclair
Barnard F. Jennings
James Keith
William G. Plummer
Lewis D. Morris
Percy Thornton, Jr.
Burch Millsap
James C. Cacheris
Judges

Fairfax County Courthouse,
Fairfax, Virginia 22030,
June 12, 1973.

Honorable Albert V. Bryan, Jr.,
Judge, United States District Court,
Eastern District of Virginia
Post Office Building,
Alexandria, Virginia 22313

Re: Frank Xavier Francisco v. J. S. Gathright;
Your Civil Action 430-72-A-M.

Dear Judge Bryan:

Mr. Gilbert W. Haith, Assistant Attorney General for the Commonwealth of Virginia, in compliance with your order concerning the above-captioned case, filed a motion requesting the appointment of counsel and immediate filing of a petition for a writ of habeas corpus in this court on behalf of Mr. Francisco. Mr. Young, administrative clerk

of the court, and at the request of the court, mailed to Mr. Francisco on February 5, 1973, three petitions for writ of habeas corpus. Mr. Young requested expeditious filing of the petition and informed Mr. Francisco that an attorney would be appointed to assist him upon filing of the petition.

This court has not received any communication from Mr. Francisco and Mr. Francisco has not filed with the court a petition for writ of habeas corpus, therefore the court feels it cannot comply with your request to afford a hearing to Mr. Francisco within 45 days. The court will immediately give him a hearing upon the filing of a petition with the court for a writ of habeas corpus.

Very truly yours,

/s/ Burch Millsap

BM:elc
cc: Gilbert W. Haith, Esq.

EXHIBIT "C"

VIRGINIA:

IN THE CIRCUIT COURT OF
FAIRFAX COUNTY
FRANK XAVIER FRANCISCO,
Petitioner,

vs.

J.S. GATHRIGHT, Superintendent
Bland Correctional Farm,
Respondent.

It appearing to the Court that counsel should be appointed in this case to consult with the Petitioner and investigate any matter which the Defendant desires to bring to the Court's attention.

It is therefore, Adjudged and Ordered that David E. Feldman, an able and experienced Attorney at Law, practicing before this Court be appointed to represent the Petitioner to consult, and investigate and assist the Petitioner in filing any petitions which he desires to file.

Enter: June 19, 1973

/s/ Burch Millsap
Judge

A Copy Teste:

W. Franklin Gooding, Clerk

By: /s/ Ann B. Cherrix
Deputy Clerk

[1]

EXHIBIT "D"

VIRGINIA:

IN THE CIRCUIT COURT OF
FAIRFAX COUNTY

Criminal No. 16767

COMMONWEALTH OF VIRGINIA

v.

FRANK X. FRANCISCO

Fairfax, Virginia
Friday, July 27, 1973.

The above-entitled matter came on for hearing before The Honorable Burch Millsap, Judge of the Circuit Court of the County of Fairfax, in Court Room No. 4 of the Fairfax County Court House, commencing at 10:00 A.M., on Friday, the 27th day of July, 1973.

Appearances:

On behalf of the Commonwealth:
Gilbert W. Haith, Esq.
Assistant Attorney General

On behalf of the defendant:
David E. Feldman, Esq.
and
Daniel C. Kaufman, Esq.

[2] PROCEEDINGS

(The Court Reporter was first duly sworn.)

The Court: Commonwealth of Virginia versus Frank X. Francisco. Are the parties ready? Is Mr Francisco present? Have a seat at counsel table.

Let the record show that the Commonwealth of Virginia is represented by its Assistant Attorney General. The defendant is present in court represented by his attorney, Mr. Feldman.

Mr. Feldman: For the record, Your Honor, I did get ahold of Mr. Kaufman the other day and I assume this is Mr. Kaufman.

Mr. Kaufman: Yes.

Mr. Feldman: He indicated he would like to stay on the case. He did not realize this proceeding was coming up, so if the Court would have no objection, I have no objection to withdrawing from the case.

The Court: Mr. Kaufman, did you represent the defendant in the federal proceeding?

Mr. Kaufman: Yes, I did.

The Court: Are you still representing him in federal proceedings?

Mr. Kaufman: Yes, I am.

The Court: The Court would give Mr. Feldman leave [3] to withdraw as counsel for Mr. Francisco and would appoint Mr. Kaufman to represent Mr. Francisco. Have you discussed this with Mr. Francisco to see if there is any objection?

Mr. Kaufman: Yes, we have and he has no objection.

The Court: He is agreeable to your appointment?

Mr. Kaufman: Yes.

Mr. Feldman: Thank you, Your Honor.

The Court: This matter is coming on somewhat on motion of the Court because of the federal court proceedings wherein the federal court granted the request of the Attorney General that this matter be resolved in a state court rather than on the federal level.

The Court directed the Clerk to mail to the defendant forms for the filing of a petition for a writ of habeas corpus and after a sufficient length of time had expired, the defendant having failed to file the petition for a writ of habeas corpus and after notifying the defendant that counsel would be appointed to represent him upon the filing of the writ, the Court then directed that he be returned to the Fairfax County Jail for the appointment of counsel.

As of this time no motions are pending before the court and the Court would be interested, Mr. Kaufman, in any [4] statements you might have to the court if it's your intention to file any motions, not file any motions, if you have been directed by Mr. Francisco to file or not file.

Mr. Kaufman: I would state as follows, Your Honor. I have discussed this matter fully with Mr. Francisco and it is my advice to him that he not file a state habeas corpus petition and he has agreed with me that it is not in his best interest to so do and he would object to any state habeas corpus proceedings being conducted in this matter.

The Court: On the motion for a new trial, he directed you not to file such a motion on his behalf?

Mr. Kaufman: I have discussed the matter with him fully and he has come to the conclusion it would not be in his best interest to obtain a new trial and for that reason no motion has or will be filed for a new trial on that basis.

The Court: Do you have any statements?

Mr. Haith: Yes, sir, Your Honor.

The Commonwealth, has under an order from the Federal District Court, to grant Mr. Francisco a plenary hearing or otherwise a habeas corpus hearing on the state court level on the issue of the Sharp versus Commonwealth case.

It is the Commonwealth's position that the refusal of the defendant to accept state habeas corpus proceedings [5] would, in fact, be a voluntary waiver of any right to exhaust his remedies in the state court on that issue and I simply want to make sure for the record that the defendant is fully aware of the fact that this can be construed as a waiver and it will be the Commonwealth's position that it is, in fact, a waiver of his right to have a new trial on the Sharp issue.

The Court: The Court is in receipt of a letter from Judge Albert V. Bryan, United States District Court for the Eastern District of Virginia. He stated he did not feel the petition would have to take any initiative. The Court is not clear as to the intention of Judge Bryan in that statement. If, and in the event, the Attorney General was directed to file a petition for a new trial, the motion for the new trial in the court on the Sharp case, would the defendant, Mr. Francisco, cooperate in the case?

Mr. Kaufman: I have not fully discussed this particuar aspect of it but my present feeling is that he would not so cooperate and it's our position that we have fully exhausted all of our state remedies in accordance with the relevant

decisions of the United States Supreme Court and to allow the state to obtain a new trial on whatever grounds it chooses would be a violation of Mr. Francisco's right against double jeopardy.

[6] The Court: Does Mr. Francisco wish to take the stand and make any statement for the record?

The Defendant: No, Your Honor.

The Court: Any further statement?

Mr. Haith: Well, Your Honor, in light of the petition of the defendant, there is nothing else the Commonwealth can do. I intend to submit this back to Judge Bryan on the basis that the defendant has intentionally waived his right to state court relief and has intentionally bypassed the state courts in this matter and will never be entitled to a new trial on the grounds of the Sharp issue.

The Court: It would be the opinion of the Court that if the defendant in this case directs his counsel not to proceed in any manner in the state court and also upon any action by the Attorney General by way of motion to bring the case before the Court, the Court cannot force upon this defendant any state proceeding if he does not wish to pursue it himself.

The Court, I do not believe, would have the authority to represent the defendant, so, therefore, there is no proceedings in the Commonwealth of Virginia.

The Court will remand the defendant to the custody of the sheriff to await transportation back to Bland Correctional [7] Institute.

Mr. Haith: Thank you, Your Honor.

(Whereupon, at 10:10 A.M., the hearing in the above-entitled matter was concluded.)

[8] CERTIFICATE OF REPORTER

I, William B. Peters, a Certified Verbatim Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter to the best of my knowledge and ability.

/s/ William B. Peters
Certified Verbatim Reporter

William B. Peters
Stenographic Reporter
4055 Chain Bridge Road
Fairfax, Virginia
273-2400